No. 22607

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ATHALIE IRVINE SMITH,

Appellant,

vs.

THE JAMES IRVINE FOUNDATION, a corporation, *et al.*,

Appellees.

Appeal From the United States District Court
Central District of California.

BRIEF FOR APPELLEES.

McCUTCHEN, BLACK, VERLEGER & SHEA,
BURNHAM ENERSEN,
HOWARD J. PRIVETT,
SHELDON A. GLBB,
615 South Flower Street, Suite 1111,
Los Angeles, Calif. 90017,

Attorneys for Appellees The James Irvine Foundation, N. Lovell McLaren, A. J. McFadden, James G. Scarborough, Robert H. Gerdes, James H. Metzger, Edward W. Carter, Mark H. Sullivan, John F. Forman, John S. Moody, Jr., Merle M. Engle and William Bradford Hellis.

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Jurisdictional Statement.

This Court has jurisdiction in this cause under the provisions of 28 U.S.C. § 1291, by virtue of a Notice of Appeal, filed December 18, 1967 [Clk. Tr. p. 187] from a final Judgment entered in the United States District Court for the Central District of California on December 18, 1967 [Clk. Tr. p. 189].

The jurisdiction of the District Court was conferred by 28 U.S.C. § 1332 by virtue of an Amended Complaint for the recovery of personal property exceeding the value of $10,000.00, exclusive of interest and costs, which shows diversity of citizenship between plaintiff and defendants [Clk. Tr. p. 4].

STATEMENT OF THE CASE.

More than 30 years have passed since the charitable trust, which is the subject of this action, was established by a written Indenture of Trust by and between James Irvine, as trustor, and the James Irvine Foundation, as trustee. Over those years trust income of approximately 6.5 million dollars has been distributed by the Foundation to worthy charities in the State of California in accordance with the provisions of the Indenture of Trust.

The plaintiff, a granddaughter of the trustor, seeks in this action to invalidate the trust and to recover the trust property, which consists of a majority of the outstanding capital stock of the Irvine Company, for herself and the other beneficiaries of the estate of James Irvine, deceased. Plaintiff has not been joined in this effort by the other beneficiaries of Mr. Irvine's estate, all of whom were made parties to the action on motion of the Foundation. Some of the beneficiaries took no position in the case. Others, including Kate L. Wheeler, who is also a granddaughter of Mr. Irvine, and the beneficial owner of the largest interest in his estate (4/8ths), opposed the plaintiff's claims and requested that the District Court enter a judgment upholding the validity of the trust and the Foundation's ownership of the trust property. Gloria Wood Irvine and Security First National Bank as executors and trustees of the estate of Myford Irvine, deceased, joined Mrs. Wheeler in this request and in their post trial brief (pp. 2-3) advised the District Court:

> "If the litigation is viewed by the Myford Irvine interests only from a selfish, financial standpoint, it might well be to their benefit in dollars and

cents if the Court held in favor of plaintiff. The Myford Irvine interests are both heirs-at-law and resulting beneficiaries under the will of James Irvine. The tax consequences of a decision for plaintiff are impossible to anticipate with any certainty and could be extremely costly, but the value of the common stock in the Irvine Company held by the Foundation is also very great indeed.

"It was the original thinking of the Myford Irvine interests that they perhaps should not urge the Court to find in favor of either plaintiff or defendant Foundation.

"Now that all plaintiff's evidence is before the Court, however, the Myford Irvine interests have concluded and respectfully submit plaintiff's contentions are not supported by convincing evidence, her theories are highly speculative and nothing more than a wishful attempt to support a case which cannot be supported."

The prosecution of the superficial claims asserted in this case can be understood only in the perspective of the events of the past ten years. During that period plaintiff has been engaged in a serious effort to disrupt and discredit the management of the Irvine Company to gain the control over its affairs which was denied to her by her grandfather's gift of the majority stock interest in the Company to the Foundation in trust for charitable uses. In this struggle for power, plaintiff with tiresome repetition has charged every chief executive officer since 1959 [Rep. Tr. p. 1988], all six of the other directors of the Company from 1957 through 1960 [Ex. E, p. 5; Rep. Tr. pp. 1343-1344] and five of the six other directors from 1960 to date [Ex. E-1,

pp. 23, 24-25, 27] with breaches of fiduciary duty, mismanagement, or incompetency [Exs. E, E-1, I-1; Rep. Tr. pp. 1343-1345].

Plaintiff has employed the services of a press agent to give widespread publicity to these unfounded charges [Rep. Tr. pp. 2454, 2467-2497]. They have also been included as allegations in two prior legal proceedings brought by plaintiff where they have been neither substantiated nor found to be creditable [Exs. E, E-1; 224 Cal. App. 2d 50, 36 Cal. Rptr. 270 (1964); 237 Cal. App. 2d 828, 47 Cal. Rptr. 392 (1965)] Plaintiff has also used recording devices concealed on her person and in the living room of her home to make secret recordings of conversations with officers and directors of the Company and meetings of its board of directors [Ex. E-2, pp. 293-301; Rep. Tr. pp. 1446-1450]. In 1961, some of these recordings made in 1959 were delivered by plaintiff's attorney to the California Attorney General [Rep. Tr. pp. 2967-2968], in his statutory capacity as the supervisor of the administration of charitable trusts [Rep. Tr. pp. 2953-2954], and plaintiff's charges were investigated and found to be without merit [Rep. Tr. p. 2963].

The Amended Complaint in this action, which is verified under oath by the plaintiff, alleges that at no time during the interval of 10 years between execution of the Indenture of Trust in 1937 and the death of James Irvine in 1947 did the Foundation "receive or have or own any present or immediate estate or interest or title in or to" the subject 510 shares of Irvine Company stock [Clk. Tr. pp. 7, 8]. However, more than 4 years before making this allegation the plaintiff

verified a complaint* against the Foundation and others in which she alleged as a fact that the Foundation was and had been the owner of said stock at all times since 1937. The allegation in the verified complaint in that action, filed July 31, 1962, was:

> "At all times referred to herein and *since 1937 the Foundation has owned and continues to own 51% of all issued and outstanding capital stock of The Irvine Company* and by virtue of said ownership has at all times mentioned herein maintained and continues to maintain voting control of the Company as majority shareholder and through its representatives which it has elected to the Board of Directors of the Company and which constitute a majority of said Board of Directors." (Emphasis added.) [Ex. E-1, p. 4; Rep. Tr. p. 1350.]

Similarly, in the Amended Complaint in the present action the plaintiff alleges under oath that the Indenture of Trust is invalid and void because its provisions contain "both charitable and noncharitable powers, purposes, uses, and trusts." [Clk. Tr. p. 8.] This is to be compared with the plaintiff's deposition testimony in her 1962 action against the Foundation. There she testified under oath:

> "Q. Now, you name the James Irvine Foundation as a defendant in this action. What is the James Irvine Foundation, so far as you know?

**Athalie I. Burt and Athalie R. Clarke v. The Irvine Company, The James Irvine Foundation, et. al.*, case number 523887, in the Superior Court of the State of California, in and for the City and County of San Francisco. Judgment in favor of the defendants was affirmed on appeal as to the Foundation by a decision filed November 2, 1965. 237 Cal. App. 2d 828, 47 Cal. Rptr. 392 (1965).

A. It is a charitable trust which was created by my grandfather in approximately 1937, I believe, and it was created so that after his death the income from the Foundation was to go to charity within the State of California and to non-tax-supported schools and individuals—individual students who found it necessary for small loans. And I think that covers it, from what I can recall.

Q. Would you say that you are generally familiar with the document establishing the James Irvine Foundation? A. Generally. There are some of the details of it that I possibly wouldn't remember offhand.

Q. However, you have seen it and read it—A. Oh, yes, I certainly have.

Q. —and studied it to some extent, have you not? A. Yes.

Q. What stock ownership in the Irvine Company is held by the James Irvine Foundation? A. Fifty-one per cent." [Ex. E-2, pp. 13-14; Rep. Tr. pp. 1364-1366].

These events are the background for this case and plaintiff's stale and shallow charges that the trust which the Foundation has administered for the benefit of California charities for more than three decades is invalid under virtually every theory discussed in the hornbooks on trust law.

All of the plaintiff's contentions of fact and her legal theories were fully tried and examined in the District Court. Almost 4,000 pages of testimony was taken and 297 documents were received in evidence. Extended post trial briefs of fact and law were filed on behalf of the plaintiff and the defendants. Thereafter, the

District Court, with the benefit of the reporter's transcript of the testimony, prepared and filed its comprehensive and well-documented Memorandum opinion setting forth its findings of fact, conclusions of law and order for judgment (277 F. Supp. 774 (1967)).

In summary, the District Court found:

1. That the executed Indenture of Trust and Mr. Irvine's letter of June 20, 1946, were delivered to the Foundation by Mr. Irvine and thereafter retained by the Foundation;
2. That the delivery of the Indenture of Trust and June 20, 1946 letter effected a present transfer of the subject 510 shares of Irvine Company stock in trust to the Foundation, subject only to being divested by the exercise by Mr. Irvine of his power of revocation;
3. That following execution of the Indenture of Trust and June 20, 1946 letter, Mr. Irvine endorsed in blank the certificates described in those instruments and delivered them to the Foundation and that thereafter during the lifetime of Mr. Irvine the Foundation had in its possession certificates endorsed in blank representing the subject 510 shares of Irvine Company stock;
4. That the delivery of the certificates endorsed in blank effected a present transfer of the subject 510 shares of Irvine Company stock to the Foundation in trust subject only to being divested by the exercise by Mr. Irvine of his power of revocation;
5. That the Indenture of Trust established a valid *inter vivos* trust and not a mere agency and that the Indenture and Mr. Irvine's June 20, 1946

letter effected an *in praesenti* transfer of the subject stock, which was not testamentary in character;

6. That the trust established by the Indenture is limited to solely charitable uses and purposes and is valid under the California law exempting charitable trusts from the rules against perpetuities and restraints on alienation; and
7. That none of the contentions of the plaintiff is well founded.

Plaintiff's appeal presents no meritorious challenge to the District Court's findings. While plaintiff claims that all of the findings are clearly erroneous (App. Op. Br. pp. 9-56), her arguments are based at most on conjecture and a liberal disregard of the settled rule that the evidence must be viewed on appeal in the light most favorable to the prevailing parties and that all intendments and inferences from the evidence must be drawn in support of the findings.

The District Court's Memorandum opinion leaves no room for doubt that its findings are supported by substantial evidence of the highest probative value. This evidence and the plaintiff's contentions as to the findings are reviewed, together with the applicable authorities, in the succeeding parts of this brief.

The thoroughness and accuracy with which the facts are presented in the District Court's Memorandum opinion make it unnecessary to include a detailed review of the facts in this statement of the case. However, the following chronological summary of background facts may assist the Court in identifying the various parties and transactions and their relationship to one another.

The Descendants of James Irvine.

James Irvine (referred to herein as Mr. Irvine) was born in 1867 and died in 1947. He was married to Frances Anita Plum from 1892 until her death in 1909. There were three children of this marriage: James, Jr. (1893-1935), Kathryn Helena (1894-1920) and Myford (1898-1959). Mr. Irvine was remarried in 1931 to Katharine Brown White. There were no issue of this marriage.

Athalie Anita Smith (the plaintiff herein) is the only child of James, Jr. She was born in 1933.

Kate L. Wheeler (one of the defendants herein) is the only child of Kathryn Helena. She was born in 1920.

Linda Jane Gaede (one of the defendants herein) and James Myford Irvine (represented herein by the estate of Myford Irvine) are the only children of Myford Irvine. Mrs. Gaede was born in 1940. James Myford Irvine was born in 1953. [Ex. E-6, p. 5].

The Irvine Company.

The Irvine Company is a West Virginia corporation. It was organized by Mr. Irvine and his nominees in the year 1896 with an authorized capital of $100,000.00 divided into 1,000 shares of the par value of $100.00 each. Mr. Irvine served as president of the company from its beginning until his death in August of 1947 [Exs. 11, D, E-6, E-9]. During his lifetime, Mr. Irvine transferred all of the stock of the Irvine Company to members of his family and the Foundation as follows:

1921—200 shares to his eldest son James, Jr. After May 21, 1921, this stock was held under the terms of an Indenture of Trust made and entered into on that day by and between Mr. Irvine and James, Jr. [Ex. B-15, Sch. G. p. 3].

1923—200 shares to his youngest son, Myford. [Ex. B-15, Sch. G, p. 1].

1935—40 shares in trust for the benefit of his wife Katharine Brown Irvine. On January 27, 1931, Mr. Irvine and Katharine Brown White entered into an ante-nuptial agreement under the terms of which Mr. Irvine established a trust of securities for her benefit. The ante-nuptial agreement was modified by a supplementary agreement dated August 17, 1935, under the terms of which 40 shares of stock of the Irvine Company were added to the corpus of the trust. [Ex. B-15, Sch. G. pp. 2-3].

1935—50 shares in trust for the benefit of his granddaughter, Kate L. Wheeler (then Kathryn Anita Lillard). Mr. Irvine established the trust by a Declaration of Trust dated August 17, 1935. [Ex. B-15, Sch. G, p. 1].

1937—505 shares to the Foundation in trust for charitable uses and purposes. The trust was established by an Indenture of Trust dated February 24, 1937. [Ex. B-15, Sch. N, p. 1].

1946—5 shares to the Foundation as an addition to the corpus of the trust established by the 1937 Indenture of Trust. [Ex. B-15, Sch. N, p. 1].

The James Irvine Foundation.

The James Irvine Foundation is a California corporation. It was organized by James Irvine for charitable purposes under the California non-profit corporation laws in the year 1937. Its Articles of Incorporation which were filed on January 6, 1937, provide *inter alia:*

> "That this corporation is formed solely for charitable purposes, namely, public welfare, health, education, comfort, happiness and general well-being, particularly of the citizens and residents of the State of California, or any part thereof, and that this is a corporation which does not contemplate pecuniary gain or profit to the members thereof. . . ." [Ex. A].

The first members and directors of the Foundation were Myford Irvine, Katharine Brown Irvine, W. H. Spaulding, N. Loyall McLaren, James G. Scarborough, Paul A. Dinsmore, and A. J. McFadden. At the first meeting of directors held on February 1, 1937, Myford Irvine was elected president, Paul A. Dinsmore was elected vice-president and E. M. Price was elected secretary and treasurer [Ex. A-14, pp. 24-25]. Mr. Irvine was never a member, director, or officer of the Foundation [Rep. Tr. p. 78].

By an Indenture of Trust dated February 24, 1937, and executed by Mr. Irvine as Trustor and by Myford Irvine and E. M. Price on behalf of the Foundation as Trustee, Mr. Irvine transferred, assigned and conveyed to the Foundation 505 shares of the capital stock of the Irvine Company, together with certain other stock and stock interests to be held in trust for charitable uses and purposes. Under the terms of the Indenture, Mr. Irvine reserved to himself a life estate interest in

the stock transferred to the Foundation, including the right to receive the dividends and certain capital distributions and the right to vote the stock during his lifetime. He also retained the power to add other property to the corpus of the trust and to revoke the trust in whole or in part or to withdraw from the trust all or any part of the trust property "by written instrument filed with the Trustee" [Ex. A-1].

At the next regular meeting of directors of the Foundation held on May 25, 1937, the following resolution was adopted:

> "RESOLVED, that the acts and deeds of Myford Irvine as President and E. M. Price as Secretary, respectively, of this corporation, The James Irvine Foundation, in executing for and in behalf of and as the corporate act and deed of this corporation, that certain Indenture of Trust dated the 24th day of February, 1937, between James Irvine as Trustor and this corporation as Trustee, and in accepting the trusteeship created by and under said Indenture of Trust and also in accepting delivery for and in behalf of this corporation as trustee under said Indenture of Trust, of the certificates of stock described in said Indenture of Trust, to-wit 505 shares of the capital stock of The Irvine Company, and 12,750 shares of the capital stock of The Moraga Company . . . be, and each and all of said acts are, hereby ratified, approved, confirmed and adopted as the acts and deeds of this corporation to the same effect for all purposes as if expressly theretofore authorized by express resolution of the Directors of this corporation, and this corporation does hereby expressly accept said trusteeship and acknowledges and de-

clares that it holds said shares of stock and the certificates evidencing same, respectively . . . as Trustee under said Indenture of Trust and subject to all the rights and obligations of Trustee thereunder." [Ex. A-14, p. 31].

From February 1937 until June 1946, Mr. Irvine made the following additional gifts to the Foundation:

1937—Absolute gift of an undivided one-half interest in real property at Jackson and Davis Streets in San Francisco (Mr. Irvine owned the other one-half interest), and $5,000.00 [Ex. A-3].

1938—Absolute gift of real property at 113 Front Street, San Francisco, and $8,000.00 [Ex. A-4].

1939—Absolute gift of $15,000.00 [Ex. A-5].

1940—Absolute gift of $15,000.00 [Ex. A-6].

1941—Surrender of power of Trustor under Indenture of Trust of February 24, 1937, to revoke the trust or to withdraw therefrom any part or parts of the property insofar as said powers apply to the 200 shares of the captial stock of the Irvine Company held in trust under the terms of the Indenture of Trust between James Irvine, Jr. and James Irvine, dated May 21, 1921 [Ex. A-7].

1942—Absolute gift of $30,000.00 [Ex. A-8].

1943—Absolute gift of $35,000.00 [Ex. A-9].

1944—Absolute gift of $15,000.00 [Ex. A-10].

1945—Absolute gift of $43,000.00 [Ex. A-11].

1946—Absolute gift of Mr. Irvine's contingent remainder interest in the 40 shares of Irvine Company stock constituting a portion of the trust he established for the benefit of his wife, Katharine Brown Irvine [Ex. A-12].

By letter dated June 20, 1946, Mr. Irvine, exercising the powers reserved to him in the 1937 Indenture of Trust, transferred an additional five shares of stock of the Irvine Company to the Foundation as an addition to the corpus of the trust and withdrew the stock of the Moraga Company. In the letter, Mr. Irvine acknowledged receipt of the Moraga Company stock from the Foundation and Myford Irvine on behalf of the Foundation acknowledged receipt of the five shares of Irvine Company stock as an addition to the corpus of the trust [Ex. A-13].

At the next regular meeting of directors of the Foundation held on June 26, 1946, the following resolution was adopted:

> "RESOLVED, that the said five shares of stock of The Irvine Company be and they are hereby accepted as an addition to the trust property provided for in that certain Indenture of Trust dated the 24th day of February, 1937, wherein James Irvine is Trustor and this corporation is Trustee; and, the act of the President in accepting said shares of stock be and the same is hereby ratified, confirmed and approved as the act and deed of this corporation.
>
> "FURTHER RESOLVED that the act of the President in returning said 12,750 shares of stock of The Moraga Company to James Irvine pursuant to the request contained in said instrument of said James Irvine dated June 20, 1946, be and the same is hereby ratified, confirmed and approved." [Ex. A-14, p. 109].

From June 20, 1946, until Mr. Irvine's death on August 24, 1947, he made no additional gifts to the Foundation or additions to or withdrawals from the corpus of the trust established by the 1937 Indenture of Trust [Rep. Tr. p. 77].

Mr. Irvine's life estate interest in the trust property terminated by his death on August 24, 1947. A special meeting of directors of the Foundation was held on September 19, 1947, at which the following resolution was adopted:

> "RESOLVED, that the President and Secretary of this corporation be and they hereby are authorized and directed to take all steps and to do and perform all things, for and on behalf of this corporation, that may be necessary to cause the certificates of the capital stock of The Irvine Company, heretofore transferred to and now held by this corporation, to be transferred on the books of The Irvine Company and new certificates representing such shares to be issued in the name of this corporation" [Ex. A-14, p. 121].

On November 18, 1947, said 510 shares of stock of the Irvine Company were transferred on the books of the Company from the name of James Irvine to the James Irvine Foundation and a new certificate for the stock was issued to the Foundation [Rep. Tr. pp. 79-80].

In 1963, the Irvine Company redeemed 10% of its outstanding stock in partial liquidation of the Company. The Foundation surrendered 51 of its 510 shares for redemption, leaving it with a total of 459 shares [Ex. D]. These are the shares which are the subject of plaintiff's action.

ARGUMENT.

I.

Plaintiff Has Failed to Sustain the Burden of Establishing That the Findings of the District Court Are Clearly Erroneous.

Rule 52(a) of the Federal Rules of Civil Procedure provides: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Under this rule the findings of a District Court are presumptively correct and an appellant has the burden of establishing that the findings are not supported by substantial evidence or that the evidence, when taken as a whole and considered in the light most favorable to the prevailing parties, *compels* a contrary finding. *General Casualty Co. v. School District No. 5,* 233 F. 2d 526, 527 (9th Cir. 1956); *Glens Falls Indemnity Company v. United States,* 229 F. 2d 370, 373 (9th Cir. 1955); *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.,* 178 F. 2d 541, 548 (9th Cir. 1949). In considering whether an appellant has sustained this burden, all intendments and inferences from the evidence must be drawn in support of the findings. *Harries v. United States,* 350 F. 2d 231, 235 (9th Cir. 1965); *Wineberg v. Park,* 321 F. 2d 214, 218 (9th Cir. 1963); *Anderson v. Federal Cartridge Corporation,* 156 F. 2d 681 (8th Cir. 1946).

In *Wineberg v. Park,* Judge Jertberg stated the rule as follows:

> "[The prevailing party] is entitled to have the evidence viewed in a light most favorable to him. We must assume that the trier of fact resolved all conflicts in the evidence in his favor. It is entitled

to all favorable inferences as may reasonably be drawn from the evidence."

321 F. 2d at 218.

Plaintiff in this case has made no attempt to evaluate the District Court's findings in terms of the evidence as a whole or to consider the evidence in the light that is most favorable to the prevailing parties. To the contrary, plaintiff has ignored much of the evidence and has based her assertions that the findings are clearly erroneous on selected bits of testimony and fragments of various documents which, at the most, show that there was a conflict in the evidence before the District Court. The plaintiff's burden in this Court cannot be sustained by such a showing. When confronted with a similar presentation in *Glens Falls Indemnity Company v. United States,* cited *supra,* this Court held:

"It is not the function of this court to retry cases on appeal. Findings of fact by the trial court are presumptively correct and will not be set aside unless clearly erroneous. . . . An appellant's mere challenge of a finding does not cast the onus of justifying it on this court. The party seeking to overthrow findings has the burden of pointing out specifically wherein the findings are *clearly* erroneous. Appellant has not carried the burden as to any particular challenged finding sufficiently to require or justify a detailed analysis of the evidence, particularly in view of the exhaustive study and discussion of the facts contained in the trial court's written memorandum. . . ."

229 F. 2d at 373.

Plaintiff also has been less than candid in summarizing the evidence on which she relies to support her arguments. For example, plaintiff asserts:

> "It appears from the contents of said letters [between Mr. Spaulding and Mr. Scarborough or Mr. Irvine being Exs. A-15-A-25] that the principal objective to be achieved under the indenture of trust was that Mr. Irvine would remain during his lifetime as the absolute owner of the 505 shares of the Irvine Company stock and that at all times during his lifetime he would have the dominion and control over said Irvine Company stock and The Irvine Company and The Irvine Foundation, as trustee and, furthermore, that the title to the Irvine Company stock would not become vested in The James Irvine Foundation, as trustee, until after the death of Mr. Irvine. This intention on the part of Mr. Irvine is referred to in the letter dated May 25, 1936, from Mr. Spaulding to Mr. Irvine. This letter was introduced in evidence as Exhibit A-15 [Tr. 3679]." (App. Op. Br. pp. 84-85).

These assertions are absolute misstatements as to the content of the referenced letters. They contain none of the statements attributed to them by plaintiff, nor do they contain statements from which plaintiff's assertions could be reasonably inferred. Only a reading of the letters themselves is required to demonstrate this fact.

Similar misstatements, exaggerations and wishful embellishments of the evidence are to be found in virtually every summary of the facts made by plaintiff in her arguments (App. Op. Br. pp. 9-117). To the extent that

plaintiff has given record citations to indicate the basis for her statements, it will be apparent to the Court how very far indeed plaintiff has gone to distort the evidence. In the more numerous instances where plaintiff has given no record citations, her assertions as to the facts may and should be disregarded by the Court.

The plaintiff's argument that the District Court's findings are clearly erroneous is, in substance, that the selected bits and fragments of evidence upon which she relies are entitled to greater weight than the evidence that was accepted by the District Court in making its findings. There is no merit in plaintiff's argument, as is set forth in detail in the succeeding parts of this brief, but it is sufficient here to note that the argument cannot aid the plaintiff in establishing that the findings are clearly erroneous. As this Court held in *Carr v. Yokohama Specie Bank, Limited,* 200 F. 2d 251 (9th Cir. 1952):

> "Where there is, as here, a conflict in the evidence it becomes the duty of the trial court to appraise all facts adduced in proof and it is not clearly erroneous for that court to choose between two permissible and conflicting views as to the weight of the evidence. . . . *We may not disturb such a choice by the trier of the facts. . . .*" (Emphasis added).
>
> 200 F. 2d at 255.

In *United States v. Yellow Cab Co.,* 338 U.S. 338, 70 S. Ct. 177 (1949), Mr. Justice Jackson, speaking for the Court, reached the same conclusion:

> ". . . [T]he [appellant] has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion

> either way but where the trial court has decided it to weigh more heavily for the defendants. *Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'* " (Emphasis added).
>
> 338 U.S. at 342, 70 S. Ct. at 179;

The same rule was applied in *Tonkoff v. Barr,* 245 F. 2d 742 (9th Cir. 1957):

> ". . . [T]he trial judge considered the motives and other indicia of credibility as applied to the various witnesses and was impressed with that evidence which sustained appellees' position. *Under such circumstances it is not our function to substitute our judgment for that of the trial court.*" (Emphasis added).
>
> 245 F. 2d at 750.

We respectfully submit that plaintiff has not sustained the burden of establishing that the findings of the District Court are clearly erroneous.

II.

The Foundation Became the Owner of the Subject 510 Shares of Irvine Company Stock by Delivery of the Indenture of Trust and Mr. Irvine's Letter of June 20, 1946.

The District Court held that the delivery of the Indenture of Trust and Mr. Irvine's letter of June 20, 1946, effected a valid transfer of ownership of the subject Irvine Company stock to the Foundation [Clk. Tr. pp. 167-168, 185]. Plaintiff specifies this holding as an error (Specification of Errors Nos. 4, 5, 9, 10 and 12; App. Op. Br. pp. 6-7).

Plaintiff does not deny, and indeed under the law of California, could not deny that the ownership of personal property may be validly transferred as between the parties to a transaction by delivery of a written instrument of conveyance without a transfer of physical possession of the property. *Stone v. Greene,* 181 Cal. 569, 185 Pac. 670 (1919); *Burkett v. Doty,* 176 Cal. 89, 167 Pac. 518 (1917); *Driscoll v. Driscoll,* 143 Cal. 528, 77 Pac. 471 (1904).

In *Burkett v. Doty,* the court stated the rule as follows:

> "It must be remembered that, as between donor and donee, it is not necessary to the validity of a gift *inter vivos,* if made by a written instrument transferring the title to the donee, that the possession of the thing given [notes] be passed to the donee. The transfer of the *right* to its immediate possession and control, the title thereto, is sufficient, and the gift then takes effect, although the donor retains all the power of control that can arise from such possession."
>
> 176 Cal. at 93; 167 Pac. at 520.

In the *Driscoll* case, the court reviewed the common law and stated the statutory basis for the rule, in part, as follows:

> "Under the common law a gift of personalty effected by a deed operated *proprio vigore* to vest the donee with the title to the property upon the delivery of the deed without a delivery of the thing given. . . . 'To transfer property by gift, there must be a deed or instrument of gift, *or* there must be an actual delivery of the thing to the donee. Both are not requisite.' (Citations omitted).

"There is no statutory requirement in this state that a gift which is effected by an executed grant shall be accompaned by a delivery of the property given, and, as between the parties to the transaction, there is no violation of law or infringement of public policy, if the donor, after he has executed the instrument of gift, shall retain possession of the property. A gift is declared by section 1146 of the Civil Code to be, 'a transfer of personal property,' which, if made in writing, is by section 1053 called a 'grant, or conveyance, or bill of sale'; and by section 1083 'vests in the transferee all the actual title to the thing transferred which the transferrer then has unless a different intention is expressed or is necessarily implied.' As under section 1053 of the Civil Code this provision applies to personal as well as real property, the interest intended to be transferred is, under section 1054 of the Civil Code vested in the transferrer upon the donor's delivery of the grant."

143 Cal. at 535-36; 77 Pac. at 474.

This rule applies specifically to transfers of corporate stock. *Francoeur v. Beatty,* 170 Cal. 740, 151 Pac. 123 (1915); *Pollard v. Pollard,* 166 Cal. App. 2d 698, 333 P. 2d 356 (1959); *Crocker v. Crocker,* 84 Cal. App. 114, 257 Pac. 611 (1927); *Young v. New Pedrara Onyx Co.,* 48 Cal. App. 1, 192 Pac. 55 (1920); *Equitable Trust Co. v. Gallagher,* 67 A. 2d 50 (Del. 1949); *Estate of Spain,* 46 N.Y.S. 2d 789 (1944); *Leedham v. Leedham,* 254 N.W. 61 (Iowa 1934); *Estate of Valentine,* 204 N.Y.S. 284 (1924). In the words of the court in *Young v. New Pedrara Onyx Co.:*

"Shares of stock are personal property, and there is no reason why, as *between the parties,* they

cannot be transferred as any other personal property. Shares in a corporation are a species of incorporeal property. They exist independently of any certificate. And though it is not uncommon to hear persons speak of the certificate itself as the 'stock,' nevertheless, the certificate that evidences the shares is but the paper representative of the incorporeal right, and stands on a footing similar to that of other muniments of title. It is not in itself the property, but is merely the symbol or paper evidence of the property, and the property right may exist without the certificate. A share of stock being an incorporeal right, incapable of manual delivery, and the certificate being nothing more than evidence of its existence, it is obvious that, in the absence of any controlling statutory inhibition, the shares, without an assignment or delivery of the certificate, may be assigned in any manner appropriate to the transfer of incorporeal personal property, as, for example, by a bill of sale, or any mode that will suffice to pass title to a chose in action or intangible property."

48 Cal. App. at 14; 192 Pac. at 60.

The *Pollard v. Pollard* case, cited *supra,* held that a written assignment was sufficient to effect a valid transfer of stock in trust. It is cited by Bogert for the rule that:

"A trust may be held created where there has been a delivery to the trustee of the instrument of transfer, even though documents representing property transferred were not handed to the trustee."

Bogert, *Trusts & Trustees* (2d ed., 1965) § 148, p. 54, n. 79.

In *Francoeur v. Beatty,* cited *supra,* the California Supreme Court held that an executed written instrument was sufficient to effect an *inter vivos* transfer of stocks and bonds even though it was not accompanied by delivery of the securities. In the words of the opinion:

> "The gift was fully and effectually made to defendant when the written instrument in his favor was executed. It was not rendered executory because accompanied by no actual delivery to defendant of the property given; nor did the mere retention itself of the property by Mrs. Hitchcock [the donor] at all affect its validity as a perfect gift. While the Civil Code, section 1147, declares that as to a 'verbal' gift it is not valid without there is actual or symbolical delivery to the donee of the thing given, this rule has no application when the gift is effected by an instrument in writing. In the latter case a complete gift is effected without an actual delivery of the subject of the gift."
>
> 170 Cal. at 745; 151 Pac. at 125.

A semantic distinction appears in the cases on this subject. In some it is said that delivery of a written conveyance amounts to a symbolic or constructive delivery of the stock certificate; others state that no delivery of the certificate is required. However, this difference in language has not produced a difference in the decisions. They have held consistently that as between a donor and his donee, delivery of a written assignment is by itself sufficient to complete a transfer of corporate stock, whether the gift is absolute or in trust.

It is equally clear that as between the parties, registration on the books of the corporation is not required to effect a valid transfer of stock ownership. *Field v. Mollison,* 50 Cal. App. 2d 585, 123 P. 2d 603 (1942).

The Uniform Stock Transfer Act (adopted in California in 1931, Corporations Code § 2450, *et seq.,* formerly Civil Code § 330, *et seq.,* and repealed as of January 1, 1965. Calif. Stats. 1963 Ch. 819 § 34), does not limit the means by which the ownership of stock may be transferred as between the parties to the transfer. Notwithstanding the provisions of the Act requiring delivery of the certificate, a valid transfer of stock may be made as between a transferor and a transferee by a written assignment without delivery of the certificate. *Berl v. Rosenberg,* 169 Cal. App. 2d 125, 336 P. 2d 975 (1959); *Hausfelder v. Security-First National Bank,* 77 Cal App. 2d 478, 176 P. 2d 84 (1946); *Kintzinger v. Millin,* 117 N.W. 2d 68 (Iowa 1962); *In re Hill's Estate,* 174 N.E. 2d 233 (Ill. 1961); *Home for Destitute Crippled Children v. Boomer,* 31 N.E. 2d 812 (Ill. 1941). The California court expressly so held in *Hausfelder v. Security First National Bank* saying:

> "The Uniform Stock Transfer Act (Civ. Code § 330 et seq.) does not forbid gifts of corporate shares by the registered owner. The rights of parties to such a gift as between themselves are the same as the gift of any other movable property."
>
> 77 Cal. App. 2d at 485, 176 P. 2d at 88.

The Supreme Court of Iowa in *Kintzinger v. Millin* cited the *Hausfelder* decision in support of its conclusion that:

> ". . . [T]he rights of the parties as between themselves are not affected by the provisions of the Uniform Act. They are enacted for the protection of the corporation, so it might safely deal in payment of dividends or otherwise with the person in whose name the stock was registered."
>
> 117 N.W. 2d at 76.

In *Home For Destitute Crippled Children v. Boomer,* the trustor executed a trust instrument transferring and assigning certain securities to named trustees for the benefit of a charitable institution. The trust was formally accepted by the trustees, but there was no manual delivery of the certificates representing the securities. They remained in the name of the trustor in a safe deposit box to which he had access. Thereafter, the trustor asserted that the trust was unenforceable because the certificates had not been delivered. The court held:

> "Boomer signed and delivered the trust instrument and he testified that he intended to create a trust when he did so. On many occasions thereafter he recognized the existence of the trust. The rights of creditors or of bona fide assignees of the certificates are not involved. The question is solely between Boomer and the trustees. We are convinced that a present unequivocal assignment of shares of stock in a corporation with intention to pass the title will accomplish the transfer of the title to the shares to the assignee as between the parties without delivery of any stock certificate."

With respect to the Uniform Stock Transfer Act, the court concluded:

> "Our view is that the provisions of the Uniform Stock Transfer Act are not applicable to the facts in the instant case. Therefore, we are of the

> opinion that the signature and delivery of the trust agreement by Boomer operated immediately to create a valid trust of the stock therein specified without delivery of the stock certificates."
>
> 31 N.E. 2d at 820-821.

The cases cited above are not in conflict with those relied upon by plaintiff. To the contrary the only case cited by plaintiff which touches on this subject, *Lawson v. Lowengart,* 251 Cal. App. 2d 98, 59 Cal. Rptr. 186 (1967), confirms the rule established by the foregoing cases, as appears from the following portion of the opinion quoted in the appendix to plaintiff's brief:

> "A delivery may be symbolic, such as delivery of a written instrument, without physical delivery of the securities themselves. . . ." (App. Op. Br. Appendix p. 60).

The sole question presented by plaintiff's argument is whether the District Court erred in finding as a fact that the Indenture of Trust and the letter of June 20, 1946 were delivered by Mr. Irvine. The contention by plaintiff that the finding is clearly erroneous is based upon the fanciful assertion that it is not supported by substantial evidence and, with respect to the delivery of the Indenture, that "there is no evidence whatever to support said finding." (App. Op. Br. p. 25).

We characterize plaintiff's assertions as fanciful because of the overwhelming amount of substantial evidence in the record, both oral and documentary, which supports the District Court's findings that the Indenture of Trust and letter of June 20, 1946, were delivered by Mr. Irvine.

In its legal sense "delivery" means:

> ". . . the manifestation of an intention that the instrument in question shall have operative effect. It does not refer necessarily to possession of the instrument or to transfer of the document from hand to hand. It relates to expression of the idea that the document is to cause a change in legal relations at once."
>
> Bogert, *Trusts & Trustees* (2nd Ed., 1965) § 147 at 49.

No precise form of words and no particular character of act is necessary to complete a delivery; any conduct of the trustor by which he makes known his intent that the instrument shall have present effect is sufficient. *Lavely v. Nonemaker,* 212 Cal. 380, 298 Pac. 976 (1931); *Marshall v. Marshall,* 140 Cal. App. 2d 475, 295 P. 2d 131 (1956); *Drummond v. Drummond,* 39 Cal. App. 2d 418, 103 P. 2d 217 (1940).

In *Lavely v. Nonemaker,* the California Supreme Court stated the rule as follows:

> "It is well settled that actual manual tradition or change of possession of a deed is not required to give it validity (Civ. Code, sec. 1059), but that delivery is primarily a question of the intention of the grantor. No particular form of delivery is necessary to give effect to a deed; any words or acts which manifest an intention on the part of the grantor that the deed shall be considered as completely executed and title conveyed are sufficient."
>
> 212 Cal. at 387, 298 Pac. at 979.

Moreover, under California law the fact that the Foundation had possession of the Indenture of Trust

and Mr. Irvine's June 20, 1946 letter and produced them in court [Rep. Tr. p. 72; 309-311], gives rise to an inference or, as some cases have referred to it, a presumption of delivery which is *prima facie* evidence that they were "delivered". *Stewart v. Silva,* 192 Cal. 405, 221 Pac. 191 (1923); *Phillips v. Menotti,* 167 Cal. 328, 139 Pac. 796 (1914); *Zihn v. Zihn,* 153 Cal. 405, 95 Pac. 868 (1908); *Belli v. Bonavia,* 167 Cal. App. 2d 275, 334 P. 2d 196 (1959); *California Trust Co. v. Hughes,* 111 Cal. App. 2d 717, 245 P. 2d 374 (1952); *Towne v. Towne,* 6 Cal. App. 697, 92 Pac. 1050 (1907).

In the *Stewart v. Silva* case, the administratrix of an estate brought an action to quiet title to property which her decedent had deeded to the defendant. The plaintiff contended that the deed had not been delivered. The attorney that prepared the deed, his clerk and the defendant all testified that the deed had been delivered. The trial court found that the grantor had executed the deed but that it was not obtained by the grantee until after the death of the grantor and gave judgment for the plaintiff, holding that the deed had not been delivered. The Supreme Court reversed the judgment, holding:

> "Even if we assume that the trial court believed and intended to find as a fact that the attorney, his clerk and stenographer, and the defendant deliberately testified falsely as to the delivery of the deed, we still have the presumption of delivery arising from the fact that the grantee in the deed actually had the possession of the deed and produced it in court. This alone constituted *prima facie* evidence of delivery (*Ward v. Dougherty,* 75 Cal. 240, 242 [7 Am. St. Rep. 151, 17 Pac. 193]). It

was there said: 'Possession of a deed of property, however, by the grantee therein named, and upon the same principle by one holding by conveyance of the same property under him, is *prima facie* evidence of its delivery.

" 'The question of delivery being one of fact, and possession being only primary evidence of delivery, he who disputes such fact may rebut the presumption arising from possession by showing that there has in fact been no delivery; but it has been said that where a deed is found in possession of the grantee, nothing but the most satisfactory evidence of nondelivery should prevail against the presumption. (Devlin on Deeds, sec. 294.).' "

192 Cal. at 409-410; 221 Pac. at 192.

Similarly, in *Phillips v. Menotti,* cited *supra,* the court held:

"The production and offer of the deed at the trial was *prima facie* sufficient evidence of its delivery."

167 Cal. at 330; 139 Pac. at 797.

An excellent statement of the burden cast upon the plaintiff by the Foundation's possession of the Indenture of Trust and Mr. Irvine's June 20, 1946 letter is found in *Towne v. Towne,* cited *supra,* as follows:

"The possession of the deed duly executed in the hands of the grantee is *prima facie* but not conclusive evidence of its delivery. It therefore follows that he who disputes this presumption has the burden of proof, and must show that there has been no delivery. And not only must this presumption be overcome, but it is held that there is such

a strong implication that it has been delivered when it is found in the hands of the grantee that only strong evidence can rebut the presumption."

6 Cal. App. at 701; 92 Pac. at 1052.

The evidence in the record does not aid plaintiff in rebutting the inference of delivery. It establishes with unmistakable certainty that Mr. Irvine "delivered" the Indenture of Trust and his June 20, 1946 letter to the Foundation.

Mr. Irvine employed the services of two attorneys, Mr. Spaulding of San Francisco and Mr. Scarborough of Los Angeles, in planning for the establishment of the Foundation and the trust it was to administer [Rep. Tr. pp. 23-24]. The planning and drafting of the Articles of Incorporation and By-Laws of the Foundation and the Indenture of Trust spanned over a period of more than a year [Rep. Tr. p. 24]. Mr. Irvine conferred with the lawyers and reviewed the several drafts of each document that were prepared [Exs. A-17, A-20, A-21; Rep. Tr. pp. 24-25].

The record discloses that one of the many matters to which Mr. Irvine devoted attention was the provision of the trust indenture which specified the corporate distributions to stockholders which were to be reserved to Mr. Irvine during his lifetime and those that were to go to the trustee [Exs. A-18, A-23].

It also appears that the validity of the *inter vivos* trust to be established by the Indenture was given careful consideration. Under date of June 19, 1936, Mr. Scarborough wrote to Mr. Spaulding, in part as follows:

"As a result of lengthy conferences with Mr. Irvine and Mr. McLaren during the last three days,

numerous changes have been suggested in our respective drafts of the instruments relating to The Irvine Foundation. At Mr. Irvine's request, we have endeavored to correlate all of the suggestions and prepare a composite draft of the proposed declaration of trust, copy of which we herewith forward for your examination. . . .

"From the legal standpoint, we feel assured of the validity of the trust in its present form. . . .

"Furthermore, since the provisions of Probate Code, Sections 41-43 (old Section 1313, Civil Code) apply only to wills and do not affect trusts created during the lifetime of the donor (*Rutherford v. Ott,* 37 Cal. App. 47; *Bowdoin College v. Merritt,* 75 Fed. 480), and since a conveyance of property in trust is not rendered testamentary in character by a reservation by the Trustor of the right to revoke same and to enjoy the rents, issues and profits thereof during his lifetime (*Tennant v. Tennant Memorial Home,* 167 Cal. 57; *Estate of Willey,* 128 Cal. 9; *Noble v. Learned,* 153 Cal. 245, 251; *Niccolls v. Niccolls,* 168 Cal. 444, 446; *American Bible Society v. Mortgage Guarantee Co.,* 217 Cal. 9, 14), the trust would appear safe from attack in this regard." [Ex. A-17].

Mr. Irvine decided against personally serving as a member or director of the Foundation [Rep. Tr. pp. 77-79], but he selected all of the people who served as the incorporators and first members and directors of the Foundation [Rep. Tr. pp. 295-296]. They executed the Articles of Incorporation and the Foundation was established by filing the Articles with the California Secretary of State on January 6, 1937 [Ex. A] and

with the Clerk of the City and County of San Francisco on January 13, 1937 [Ex. A-14, p. 20].

Shortly thereafter, on February 1, 1937, the first meeting of the incorporators and members was held to organize the corporation [Ex. A-14, pp. 20-22]. At this meeting a certified copy of the Articles of Incorporation was presented and ordered filed in the corporate records, by-laws were adopted, a corporate seal was adopted and directors were elected. Following that meeting, the directors held their first meeting to complete the organization; officers were elected, the corporation's principal place of business was established, a depositary was established and the officers were authorized to deposit and withdraw corporate funds, the secretary was authorized to rent a safe deposit box for the corporation; and the three officers, or any two of them, were authorized to enter the box [Ex. A-14, pp. 24-26]. While Mr. Irvine was not a member or director of the Foundation, he attended some of their meetings when he was in San Francisco, including the organizational meetings held on February 1, 1937 [Rep. Tr. pp. 77-79, 323, 330].

From these events and the contemporaneous written record from which they appear, several facts are inescapable:

1. Mr. Irvine desired to establish a trust that would be effective during his lifetime and continue after his death in perpetuity;

2. Mr. Irvine spent considerable time, effort and money for legal assistance to implement his desire in accordance with the applicable law;

3. Mr. Irvine was professionally advised that the trust instrument which resulted from these efforts was

legally sufficient to establish a valid *inter vivos* trust that would be perpetual; and

4. Mr. Irvine brought about the creation of a special entity to serve as trustee which had perpetual existence, was limited to charitable purposes and had, legally and in fact, the capacity, personnel and facilities to administer the trust and to take title to and safely keep the trust property.

On February 24, 1937, twenty-three days after completion of the organization of the Foundation, the Indenture of Trust was formally executed by Mr. Irvine, as trustor. At the same time, the trust was accepted and the Indenture was executed on behalf of the Foundation, as trustee, by Myford Irvine, its president, and by Miss Price, its secretary, and the corporate seal was affixed [Ex. A-1, p. 10]. The paragraph of the Indenture that precedes the signatures and corporate seal reads as follows:

> "IN WITNESS WHEREOF, the *Trustor has executed* these presents on the day and year first hereinabove written, and the Trustee has also executed these presents at the same time by its officers thereunto duly authorized, in token of the acceptance by the Trustee of the trusts hereinabove set forth." (Emphasis added).

Section 1933 of the California Code of Civil Procedure provides:

> "The execution of an instrument is the subscribing and *delivering it,* with or without affixing a seal." (Emphasis added).

Under this statute, the declaration by Mr. Irvine, as trustor, and by Myford Irvine and Miss Price on behalf of the Foundation, as trustee, that "the Trustor

has executed" the Indenture, imports both the signing and the delivery of the instrument. Moreover, section 1055 of the California Civil Code provides that "a grant duly executed is presumed to have been delivered at its date."

The best evidence of what Mr. Irvine intended to accomplish by signing the Indenture and passing it to the officers of the Foundation for acceptance, is, of course, the language of the instrument itself. It does not say that title to the trust property shall not vest in the Foundation until some future date or event or that Mr. Irvine shall retain the title until after his death, as is so frequently verbalized in plaintiff's argument (App. Op. Br. pp. 35, 38, 50-52). To the contrary, it provides:

> "That the Trustor *hereby transfers, assigns and conveys* to the Trustee, to have and to hold in trust, nevertheless and for the following trust uses and purposes, the following securities, to-wit:
>
> "-505- shares of the capital stock of The Irvine Company, . . ." (Emphasis added). [Ex. A-1, p. 1].

The words used are very clearly and unmistakably words of *present* transfer which effect an immediate change in the ownership of the Irvine Company stock. The effect to be accorded to such words was well stated by the California Supreme Court in *Burkett v. Doty,* cited *supra,* as follows:

> "[A]s the effect of that assignment, according to its terms, was to immediately transfer to the plaintiff the title and ownership of the notes, it constituted satisfactory, if not conclusive, evidence of the intent of the assignor to do that which the instrument, in law, would accomplish, that is, to

> divest herself of all right of dominion over the notes and of all present right to, or control over, them, and to make an immediate transfer of the title thereto."
>
> 176 Cal. at 93; 167 Pac. at 520.

The subsequent provisions of the Indenture of Trust confirm that a present transfer of the stock was the intended effect of the instrument. One provision specifies the corporate distributions during Mr. Irvine's lifetime which shall be the property of Mr. Irvine and which shall be paid to the Foundation as part of the trust property. In another provision the right to vote the stock is expressly reserved to Mr. Irvine during his lifetime [Ex. A-1, pp. 2-3]. Such provisions, of course, would have been meaningless and unnecessary unless Mr. Irvine intended the Indenture to effect a present change in the ownership of the stock.

Mr. Irvine signed the Indenture and signified his intent that it should have present operative effect in the manner in which formal deeds and trust instruments are customarily delivered, by passing it to the officers of the Foundation for acceptance. When the Foundation's acceptance was given by execution of the instrument by its president and secretary and affixing its corporate seal, the Indenture of Trust was a completed legal act [Ex. A-1, p. 10]. The endorsement of an acceptance on an instrument of conveyance is evidence of the highest probative value of the delivery of the instrument and the Foundation's formal acceptance endorsed on the Indenture of Trust and Mr. Irvine's letter of June 20, 1946, is by itself sufficient to sustain the District Court's finding that those instruments were delivered.

" 'Where, at the request of a grantor, a person named as trustee in a deed which creates a trust enters his acceptance of the trust created upon such deed, such acceptance presumes conclusively a delivery of such deed by the grantor to the trustee.' "

Hall v. Hall, 47 S.E. 2d 806 (Ga. 1948) at 810.

"Plaintiffs also insist that the trust agreement of September 8, 1933, was never delivered during Price's lifetime. . . . Manual delivery is unnecessary. Crow v. Crow, 348 Ill. 241, 180 N.E. 877. Where a binding agreement is signed by the parties, as in the present case, it is of but little legal significance. Here, defendant had accepted in writing the terms and provisions of the deeds made to him as trustee. This was a sufficient delivery. Meldahl v. Wallace, 270 Ill. 220, 110 N.E. 354; Dickerson v. Dickerson, supra."

Jackson v. Pillsbury, 44 N.E. 2d 537 (Ill. 1942) at 548.

Mr. Irvine also delivered to the Foundation endorsed in blank certificates representing the stock conveyed by the Indenture. (As appears from the authorities cited in part III *infra,* the delivery of the certificates endorsed in blank was also sufficient to pass title to the stock to the Foundation. However, the delivery of the certificates is relevant to the present inquiry only as further evidence of Mr. Irvine's intent that the Indenture of Trust have operative effect to transfer ownership of the stock. Since the evidence that establishes delivery of the certificates is reviewed in detail in part III *infra,* it will not be discussed here except where it also pertains to delivery of the Indenture of Trust.)

Mr. Irvine attended the first annual meeting of members and the first regular meeting of directors of the Foundation held on May 25, 1937. At those meetings the members and directors were advised by the president of the execution of the Indenture of Trust, the delivery of the certificates representing the stock and the acceptance of the trust and the stock certificates on behalf of the Foundation by the president and secretary [Rep. Tr. pp. 56-58]. These acts were ratified, approved and confirmed as the acts of the corporation and it was formally acknowledged and declared that the 505 shares of Irvine Company stock and the certificates evidencing the same were held by the Foundation as trustee under the Indenture of Trust by adoption of the following resolution:

> "RESOLVED, that the acts and deeds of Myford Irvine as President and E. M. Price as Secretary, respectively, of this corporation, The James Irvine Foundation, *in executing for and in behalf of and as the corporate act and deed of this corporation, that certain Indenture of Trust* dated the 24th day of February, 1937, between James Irvine as Trustor and this corporation as Trustee, and *in accepting the trusteeship* created by and under said Indenture of Trust and also *in accepting delivery for and in behalf of this corporation as trustee under said Indenture of Trust, of the certificates of stock described in said Indenture of Trust, to-wit: 505 shares of the capital stock of The Irvine Company*, and 12,750 shares of the capital stock of The Moraga Company, and other property therein mentioned particularly all rights present and future of said James Irvine in certain

200 shares of the capital stock of The Irvine Company now evidenced by Certificate Number 40, be, and each and all of said acts are, hereby ratified, approved, confirmed and adopted as the acts and deeds of this corporation to the same effect for all purposes as if expressly theretofore authorized by express resolution of the Directors of this corporation, and *this corporation does hereby expressly accept said trusteeship and acknowledges and declares that it holds said shares of stock and the certificates evidencing same, respectively,* and said rights in said 200 shares of stock of The Irvine Company evidenced by said Certificate Number 40, *as Trustee under said Indenture of Trust and subject to all the rights and obligations of Trustee thereunder.*" (Emphasis added). [Ex. A-14, pp. 28, 31].

By statute in California the minutes of the meetings of the members and directors of a corporation are *prima facie* evidence "of the facts or actions stated therein". Calif. Corp. Code § 832, *Duff v. Schaefer Ambulance Service, Inc.,* 132 Cal. App. 2d 655, 673, 283 P. 2d 91, 103 (1955).

The weight to be accorded to the minutes as *prima facie* evidence was well stated by the California Supreme Court in *Miller and Lux, Inc. v. Secara,* 193 Cal. 755, 227 Pac. 171 (1924), as follows:

"Therefore, when *prima facie* evidence of a given fact has been introduced, its effect is not destroyed by the introduction of contradictory evidence. It stands as *proof* of that particular fact unless and until it is *both contradicted and overcome* by such other evidence. 'Proof' is something more

than merely 'evidence.' It is 'the establishment of a fact by evidence.' "

193 Cal. at 770-771; 227 Pac. at 176.

There is no evidence in the record that either contradicts or overcomes the facts and actions stated in the minutes of the meetings of members and directors of the Foundation held on May 25, 1937. Moreover, the accuracy of the minutes was verified by Mr. McLaren who is the only person now living who attended the meetings [Rep. Tr. pp. 55-58]. Accordingly, the minutes stand as proof that:

1. The execution of the Indenture of Trust by Myford Irvine and Miss Price was the act and deed of the Foundation;

2. The acceptance of delivery of the certificates representing the 505 shares of Irvine Company stock by Myford Irvine and Miss Price was the act and deed of the Foundation;

3. The Foundation accepted the trusteeship created by and under the Indenture of Trust; and

4. The Foundation, on May 25, 1937, held the 505 shares of Irvine Company stock and the certificates evidencing the same as trustee under the Indenture of Trust.

Wholly aside from the *prima facie* evidence which the minutes provide under the California statute, they are entitled to great weight in support of the findings of the District Court. They are a formal contemporaneous written record of events that occurred more than 30 years ago. They were prepared in the ordinary course of business at a time when no lawsuit was pending or contemplated and by people who had every reason to accurately state Mr. Irvine's acts and inten-

tions and no personal interest that would have been served by recording the events more favorably to the Foundation than they were. If anything, the transfer of Mr. Irvine's stock to the Foundation was against the pecuniary interest of Myford Irvine, the Foundation's president, since he was then Mr. Irvine's only living child and the heir apparent to a portion of his estate.

After the formal acceptance by the Foundation of the trusteeship of the trust and the delivery of the certificates representing the subject stock, Mr. Irvine acknowledged and confirmed the operative effect of the Indenture of Trust on numerous occasions, both orally and in writing. By letter dated December 18, 1937, Mr. Irvine made an absolute gift to the Foundation of certain real property and money, and stated:

> "Specifically this gift is not subject to the terms of the Indenture of Trust *between ourselves* dated February 24, 1937. . . ." (Emphasis added) [Ex. A-3].

This direct and unequivocal confirmation of the operative effect of the Indenture is repeated in substantially the same words in Mr. Irvine's subsequent letters transmitting absolute gifts to the Foundation, dated December 29, 1938 [Ex. A-4], December 28, 1939 [Ex. A-5], December 27, 1940 [Ex. A-6], December 28, 1942 [Ex. A-8], December 29, 1943 [Ex. A-9], December 27, 1944 [Ex. A-10], and December 29, 1945 [Ex. A-11]. The only reasonable inference that can be drawn from Mr. Irvine's repeated references in the letters to "the terms of the Indenture of Trust between ourselves dated February 24, 1937" is that the Indenture had been given effect and was in operation.

Mr. Irvine also verified the operative effect of the Indenture of Trust by exercising the powers reserved to him as trustor under its terms. By letter to the Foundation dated January 31, 1941, he exercised the power reserved to him to withdraw from the trust "by written instrument filed with the trustee" property conveyed to the Foundation by the Indenture. The following portion of the text of this letter shows unequivocally that Mr. Irvine had delivered the Indenture of Trust and understood that it was operative and in effect:

> "By an Indenture of Trust between us dated February 24, 1937, I transferred, assigned and conveyed to yourselves, among other property, the following:—
>
> " 'Also, the 200 shares of the capital stock of The Irvine Company now evidenced by Certificate Number 40, and now held in trust under the terms set forth in that certain Indenture of Trust dated May 21, 1921, between James Irvine, Jr., and James Irvine, and all interest, present and future, of the Trustor herein in or to said 200 shares or any thereof.'
>
> "The 'Trustor herein' was myself, but by said Indenture of Trust of February 24, 1937, it was 'made an express term and condition of this trust that the Trustor may at any time and from time to time, at his sole will and discretion, by written instrument filed with the Trustee, revoke this trust in whole or in part, and may withdraw therefrom all or any part or parts of the property, which may have been contributed to this trust by him', and such 'term and condition' applied, and applies, to said 200 shares.

"It is now my desire to make a present and absolute gift to yourselves, The James Irvine Foundation, of said 200 shares of the capital stock of The Irvine Company and of all my right, title, interest, claim or demand, present or future, in or to said 200 shares of stock or any thereof, and, in furtherance of this gift I hereby terminate said 'express term and condition' of said Indenture of Trust dated February 24, 1937, so far only however, and not otherwise, as the same relates to and affects said 200 shares of stock and any right, title, interest, claim or demand on my part therein or thereto, present or future. . . ." [Ex. A-7].

Five years later, by letter dated June 20, 1946, Mr. Irvine again exercised the powers reserved to him in the Indenture of Trust. On this occasion, again "by written instrument filed with the trustee," he added five shares of Irvine Company stock to the trust property and revoked the trust as to the 12,750 shares of Moraga Company stock (which had been conveyed to the Foundation by the Indenture along with the initial 505 shares of Irvine Company stock) and requested that the Foundation deliver to him a certificate or certificates representing the Moraga stock as required by the provisions of the Indenture [Ex. A-13]. In taking this action, Mr. Irvine made it clear that he was acting under the terms of the Indenture, saying:

"Acting pursuant to the terms of that certain Indenture of Trust dated the 24th day of February, 1937, wherein I am Trustor and The James Irvine Foundation is Trustee, and wherein it is provided in part as follows:

* * * *

"I herewith hand to you as an addition to the trust property of said trust the following securities standing in my name and endorsed by me in blank: . . ." [Ex. A-13].

At the regular meeting of directors of the Foundation held on June 26, 1946, which Mr. Irvine also attended [Rep. Tr. pp. 77-78], the letter from Mr. Irvine dated June 20, 1946, was read by Myford Irvine [Rep. Tr. pp. 74, 1815] and the directors were advised that Myford had accepted the 5 shares of the Irvine Company stock as an addition to the trust property and had returned to Mr. Irvine the 12,750 shares of stock of the Moraga Company which had been withdrawn from the trust by the letter [Ex. A-14, pp. 107-108]. The acts of the president were ratified, confirmed and approved as the act of the Foundation by the adoption of the following resolutions:

"RESOLVED, that the said five shares of stock of The Irvine Company be and they are hereby accepted as an addition to the trust property provided for in that certain Indenture of Trust dated the 24th day of February, 1937, wherein James Irvine is Trustor and this corporation is Trustee; and, the act of the President in accepting said shares of stock be and the same is hereby ratified, confirmed and approved as the act and deed of this corporation.

"FURTHER RESOLVED that the act of the President in returning said 12,750 shares of stock of The Moraga Company to James Irvine pursuant to the request contained in said instrument of said James Irvine dated June 20, 1946, be and the same is hereby ratified, confirmed and approved." [Ex. A-14, p. 109].

Mr. McLaren and Mr. Gerdes attended this meeting, and both testified that the minutes correctly reflect the action that was taken at the meeting [Rep. Tr. pp. 75, 1815]. As has been discussed previously, the minutes of the meeting are *prima facie* evidence of the facts and actions stated therein. Calif. Corp. Code § 832.

The evidence also discloses that Mr. Irvine orally acknowledged the operative effect of the Indenture of Trust on many occasions.

Sometime before the first regular meeting of directors of the Foundation held on May 25, 1937, Mr. Irvine and Myford Irvine reported to Mr. McLaren that the Indenture of Trust had been executed, the stock certificates had been endorsed in blank and that an acknowledgment had been obtained from Myford Irvine and Miss Price as officers of the corporation "which constituted a formal acceptance of the stock" and that "the only thing that remained was for this act to be ratified by the board of directors at their next meeting" [Rep. Tr. pp. 54-55].

Prior to June 20, 1946, Mr. Irvine conversed with Mr. McLaren about the changes in the trust property that he had under consideration. Mr. McLaren testified regarding the conversation in part as follows:

> "Mr. Irvine told me that he only had left five shares of the stock of The Irvine Company, and that by adding this holding to the shares already owned by The Foundation, that it would bring the total holding up to 51 percent, which would clearly establish control, and might at some time have an effect on cumulative voting and matters of that kind" [Rep. Tr. pp. 72-73].

Before Mr. Gerdes prepared Mr. Irvine's will, Mr. Irvine told him on a number of occasions that he had

made a gift of 505 shares of Irvine Company stock to the Foundation in 1937 [Rep. Tr. pp. 1808, 1813]. In connection with the preparation of the will Mr. Gerdes was told by Mr. Irvine that "he had only five shares [of Irvine Company stock] left and that he desired and intended to give that to The Foundation and also at the same time that he intended to revoke the trust insofar as it applied to The Moraga Company stock." [Rep. Tr. p. 1813].

Mr. Kent A. Sawyer was an attorney engaged in practice, first as an associate and then as a partner, in the firm of Hall, Henry & Oliver in San Francisco from 1944 to 1952 [Rep. Tr. p. 446]. At a conference with Mr. Irvine and Miss Price in Mr. Irvine's office on June 21, 1946, Mr. Sawyer was advised that the Foundation held stock certificates "transferred" to it by Mr. Irvine endorsed in blank [Ex. A-56; Rep. Tr. pp. 469-470]. At the same conference Mr. Sawyer was told "not in numbers" but the fact that the "shares had been delivered" [Rep. Tr. p. 468].

Mr. Irvine requested an opinion from Mr. Sawyer regarding the validity of the trust established by the Indenture saying that "he wanted to be sure it was valid" and "would like another opinion on it" [Rep. Tr. p. 472]. Mr. Sawyer was furnished with a copy of the Indenture of Trust and by letter dated July 9, 1946, he advised Mr. Irvine:

> "In our opinion the rule of *Nichols v. Emery* supra, is still followed to its letter and the trust *is valid.*" (Emphasis added). [Ex. A-57].

A copy of this letter was also sent to Mr. Gerdes [Rep. Tr. p. 1818]. Subsequently, Mr. Gerdes asked Mr. Sawyer for an opinion regarding the applicability of California Probate Code sections 40-43 to Mr. Ir-

vine's gift in trust of Irvine Company stock to the Foundation [Rep. Tr. p. 1819]. Mr. Sawyer responded by letter dated August 26, 1946, in part, as follows:

> "Since under California law this trust instrument passes an interest prior to death, although a defeasible one, it is not subject to the above-mentioned provisions of the Probate Code which have reference only to transfers 'by will'. See: *President of Bowdoin College v. Merritt* (1896) 75 Fed. 480; *Rutherford v. Ott* (1918) 37 Cal. App. 47. Unless the holdings of, or views expressed in, the foregoing cases are rejected in any litigation which may arise out of the trusts created for The James Irvine Foundation, I do not see how such trusts can be invalidated. Rejection of the principles of the above cases would also involve repudiation of the decision in Nichols v. Emery (1895) 109 Cal. 323 and the long line of cases which have followed such decision." [Ex. A-58].

Mr. Irvine's acts and his oral and written statements reviewed above clearly substantiate the District Court's finding that Mr. Irvine delivered the Indenture of Trust and his letter of June 20, 1946, to the Foundation. The record leaves no room for doubt that Mr. Irvine intended those instruments to be effective immediately to transfer title to the subject Irvine Company stock to the Foundation, as trustee of the trust esablished by the Indenture. In the testimony of all of the witnesses and in all of the records marked as exhibits, there cannot be found a single act or utterance by Mr. Irvine indicating a contrary intention.

The flimsy nature of plaintiff's argument that the District Court's finding is clearly erroneous is revealed by plaintiff's reliance on the unsupported assertion that Mr. Irvine had possession of the Indenture during his

lifetime (App. Op. Br. p. 22). The District Court rejected plaintiff's contention on the ground, among others, that "there is lacking any evidence showing possession of the indenture by James Irvine following its execution." [Clk. Tr. p. 167]. Moreover, the District Court found that "the indenture of trust was, following its execution, delivered to the Foundation by James Irvine *and it was thereafter retained by it.*" (Emphasis added) [Clk. Tr. p. 168]. Plaintiff asks the Court to overturn this finding not on the basis of a preponderance of contrary evidence, but on the basis of an imaginative speculation. Plaintiff argues:

> "The inference to be drawn from said minutes [of the meeting of Foundation directors held on September 19, 1947] is that E. M. Price, as the confidential secretary and agent of James Irvine, had kept said indenture of trust in the safe at Mr. Irvine's office where she had also kept the Irvine Company stock certificates, and that her possession of the Irvine Company stock and/or the indenture of trust, as the agent of Mr. Irvine during his lifetime, continued as the agent of the executors of the Estate of James Irvine after he died, which inference is supported by Exhibits D-2 [Tr. 2328] and D-3 [Tr. 2937], the letters from E. M. Price to Mr. Hellis, as secretary of The Irvine Company, dated respectively November 7, 1947 and November 13, 1947. . . ." (App. Op. Br. p. 22).

Neither the minutes of the September 19, 1947 meeting of the Foundation's board of directors [Ex. A-14, pp. 120-121] nor Miss Price's letters of November 7, 1947 [Ex. D-2] and November 13, 1947 [Ex. D-3] provide any support whatever for plaintiff's conjecture.

Miss Price was the duly elected secretary of the Foundation and had served in that capacity continuously from the first meeting of the board of directors held on February 1, 1937 [Ex. A-14, p. 24] until her death in 1959 when she was replaced by Mr. Beaubien [Rep. Tr. pp. 51-52, 928]. As is customary for corporate secretaries, one of Miss Price's duties as secretary of the Foundation was to keep and maintain its corporate records [Rep. Tr. pp. 904-905; Ex. A-14]. The place where some Foundation records were kept by Miss Price was the subject of the following testimony of Mr. Beaubien on cross-examination by plaintiff's counsel:

> "Mr. Young: And there were records kept in the Foundation safe?
>
> The Witness: Yes, Foundation records, yes.
>
> Mr. Young: In her office that she had the safe in?
>
> The Witness: Yes." [Rep. Tr. p. 978b].

The other place where Foundation records were kept and where the certificates representing its Irvine Company stock were kept was a safe deposit box at the vaults of the Crocker First National Bank of San Francisco, which the board of directors authorized Miss Price to rent on behalf of the Foundation on the basis that only its three officers or any two of them could have access [Ex. A-14 p. 26]. The reason the board of directors took this action at their meeting on February 1, 1937 was explained in the testimony of Mr. McLaren, one of the directors who attended the meeting and voted on the resolution, in part as follows:

> "Originally in discussions with respect to the formation and operation of the trust it had been sug-

gested that valuable papers be kept in the safe in Mr. Irvine's office. On further reflection—and I don't recall who the suggestion came from—it was pointed out that The Foundation was about to receive a majority of the stock of The Irvine Company, which was extremely valuable, and that therefore it would be wise to deposit that stock, The Moraga Company stock, and such items as the Articles of Incorporation and other valuable documents, in the safest place possible, and that is why the box was rented in the Crocker Bank and authorized at this meeting." [Rep. Tr. p. 50].

The minutes of the special meeting of the Foundation board of directors held on September 19, 1947 [Ex. A-14 pp. 120-121] on which plaintiff relies as the basis for her speculation, disclose (1) that Miss Price attended the meeting in her capacity as secretary (2) that following the adoption of a memorial resolution commemorating the death of Mr. Irvine, the secretary at the request of the president, read the Indenture of Trust and (3) that the directors adopted the following resolution:

"RESOLVED, that the President and Secretary of this corporation be and they hereby are authorized and directed to take all steps and to do and perform all things, for and on behalf of this corporation, that may be necessary to cause the certificates of the capital stock of The Irvine Company, heretofore transferred to and now held by this corporation, to be transferred on the books of The Irvine Company and new certificates representing such shares to be issued in the name of this corporation." [Ex. A-14, p. 121].

It was pursuant to the direction given in the quoted resolution that Miss Price sent her letters of November 7, 1947 [Ex. D-2] and November 13, 1947 [Ex. D-3] to the Irvine Company surrendering the certificates representing the Foundation's stock for transfer into the name of the Foundation on the books of the Company. While plaintiff now speculates that Miss Price might have sent these letters on behalf of the executors of Mr. Irvine's estate, the recipient of the letters in the Irvine Company had no such doubt. He addressed his registered reply to:

"Miss E. M. Price, Secretary
The James Irvine Foundation
820 Crocker Building
San Francisco, California." [Ex. D-4].

There is no evidence in the record whatever to support plaintiff's speculation that the Indenture of Trust was in Mr. Irvine's possession at the time of his death. Moreover, plaintiff is engaged in an idle speculation. After Mr. Irvine delivered the Indenture of Trust to the Foundation, and it was accepted, the legal effect of the instrument would not have been altered if it had been returned to Mr. Irvine or placed in his safe deposit box at the bank for safekeeping. *Stone v. Daily,* 181 Cal. 571, 185 Pac. 665 (1919); *Leydecker v. Warren,* 135 Cal. App. 2d 484, 288 P. 2d 51 (1955).

In *Stone v. Daily,* the California Supreme Court was presented with such a case and held, as follows:

> "The case, then, is one where the formality of a delivery is gone through with with the intent of making an immediately effective conveyance, but after delivery the grantor retains possession of the deed for purposes of safekeeping. That such a de-

livery is valid and is not affected by the fact that the instrument subsequently remains in the possession of the grantor is well established. Chancellor Kent, in his Commentaries (volume 4, pages 455, 456), says: 'So, if a deed be duly delivered in the first instance, it will operate though the grantee suffer it to remain in the custody of the grantor. If both parties be present, and the usual formalities of execution take place, and the contract is to all appearances consummated without any conditions or qualifications annexed, it is a complete and valid deed, notwithstanding it be left in the custody of the grantor.'

"In Devlin on Deeds (third edition), section 278a, it is said: 'Where a deed has been duly delivered, the fact that the grantee allows it to remain in the custody of the grantor will not invalidate it. A deed may be returned, after delivery to the grantor, so as to insure that it would not be placed on record without affecting the delivery.' . . .

"Counsel for defendant refer to the language of a number of cases . . . to the effect that 'The essential requisite to the validity of a deed transferred under circumstances as indicated in this case, is that when it is placed in the hands of the third party, it has passed beyond the control of the grantor for all time.' But an examination of these cases shows at once that when they speak of the necessity of the control of the instrument passing from the grantor for all time, they mean control in the sense of power to recall it, control over it as an effective instrument of conveyance, not control in the sense of having the mere physical custody of it."

181 Cal. at 581-582, 185 Pac. at 669-670.

Plaintiff also argues that the tax records of the Foundation (App. Op. Br. pp. 106-109) and the Irvine Company (App. Op. Br. p. 95) support her contention that the District Court erred in finding that Mr. Irvine transferred the 510 shares of Irvine Company stock to the Foundation (App. Op. Br. p. 107). The evidence does not support plaintiff's argument.

With respect to the tax records of the Foundation, plaintiff asserts that the affidavit of Miss Price which was submitted to the Internal Revenue Service (hereinafter referred to as "IRS") to obtain the 1939 ruling [Ex. A-2] that the Foundation was exempt from income tax, did not disclose the Foundation's ownership of the subject stock (App. Op. Br. p. 107). Plaintiff also asserts that the tax returns filed by the Foundation [Ex. 21] failed to disclose its ownership of the subject stock (App. Op. Br. pp. 107-108). Neither of these assertions is true; nor are they particularly relevant in determining Mr. Irvine's intent to make a present transfer of title to the subject stock to the Foundation.

The affidavit of Miss Price, which was sent to the IRS by Mr. Whitehead in June 1939 [Ex. K], cannot now be found [Rep. Tr. pp. 2820-2821]. The same is true as to three of the Foundation's tax returns [Rep. Tr. pp. 2259, 2793]. The Foundation did not have copies of the documents and requested copies of the originals from the IRS [Ex. A-2; Rep. Tr. p. 2793]. The IRS, by letter, advised the Foundation that the documents had been lost or destroyed [Ex. A-27; Rep. Tr. p. 2793].

Mr. Whitehead, who has been a certified public accountant since 1934, was in charge of and prepared all of the Foundation's tax returns [Rep. Tr. pp. 2764,

2785] and prepared all of the accounting exhibits that were annexed to the affidavit of Miss Price which was the basis for the IRS ruling that the Foundation was an exempt charitable organization [Rep. Tr. pp. 2823, 2826]. Mr. Whithead read the Indenture of Trust in 1937 and was told that 505 shares of Irvine Company stock had been transferred to the Foundation [Rep. Tr. pp. 2893-2894]. Mr. Whitehead was also given access to the Foundation's books [Ex. A-76, A-77] and used the information in the books in the preparation of the tax returns as well as the accounting exhibits to Miss Price's affidavit [Rep. Tr. pp. 2819, 2825, 2830].

Mr. Whitehead searched his files but could not find a copy of Miss Price's affidavit [Rep. Tr. pp. 2820-2821]. However, the files did contain a copy of the letter by which he sent the affidavit to the IRS, under date of June 14, 1939, and pencil copies of the accounting exhibits that accompanied the affidavit [Rep. Tr. pp. 2820, 2823]. These exhibits designated "C" and "D" to Miss Price's affidavit were prepared by Mr. Whitehead from a work sheet which contains the information he extracted from the Foundation's books [Rep. Tr. pp. 2826-2828, 2838].

The work sheet (which is the last page of defendant's Exhibit K in the record of this case) lists the property of the Foundation as follows:

"Jackson & Davis—½ Int.	35,000.00
Front St. property	17,500.00
Irvine Co. 505 shs.	1.00
Moraga Co. 12750 shs.	1.00"

[Ex. K, p. 4].

This information was carried forward by Mr. Whitehead into Exhibit C to Miss Price's affidavit [Rep. Tr. pp. 2828-2829] as follows:

"Real Estate:

Front St. property	17,500.00	
Jackson & Davis—		
½ interest	35,000.00	52,500.00
Interest in securities—nominal value		2.00"

[Ex. K, p. 2].

The Foundation's corporate income tax return for the year ending April 30, 1939, which was signed by Paul A. Dinsmore as vice president and by Miss Price, was forwarded to the IRS along with Miss Price's affidavit by Mr. Whitehead's letter of June 14, 1939 [Exs. K, 21]. The return contained the following statement:

> "The corporation is a corporation organized exclusively for charitable purposes, no part of the income of which inures to a shareholder. It operates only as such a charitable corporation and no part of its income is used to influence legislation of any kind.
>
> "Pursuant to the provisions of Article 101-1 of Regulations 101, the corporation has submitted an affidavit of its secretary containing information required by such regulation to establish the exempt status of the corporation under the provisions of Section 101(6) of the Revenue Act of 1938. Said affidavit is incorporated in and made a part of this return by reference." [Ex. 21—Return for fiscal year beginning May 1, 1938 and ending April 30, 1939].

In all of the Foundation tax returns for subsequent years, Mr. Whitehead listed the ownership of first 505 shares and then after 1946, 510 shares of Irvine Com-

pany stock by including in the balance sheet contained in the returns the $2.00 nominal carrying value assigned to the shares in the Foundation books [Ex. 21; Rep. Tr. pp. 2845-2847]. The same method of reporting the Foundation's ownership of Irvine Company stock was used after the death of Mr. Irvine [Rep. Tr. pp. 2855-2857]. The returns for the years ending April 30, 1948, 1949 and 1950 all contain the same $2.00 listing for the stock, as appeared in the returns filed prior to Mr Irvine's death [Ex. 21; Rep. Tr. pp. 2855-2857].

Mr. Whitehead alone determined the manner in which the Foundation's ownership of Irvine Company stock under the terms of the Indenture of Trust should be reported in the accounting exhibits to Miss Price's affidavit and in the balance sheets that were included in all of the Foundation's tax returns [Rep. Tr. pp. 2844-2845, 2849-2851]. Mr. Whitehead also had the responsibility of deciding how and what the Foundation was required to report to the IRS under the applicable regulations [Rep. Tr. p. 2849]. The Foundation officers relied entirely on Mr. Whitehead with respect to all tax matters [Rep. Tr. p. 2844].

Mr. Whitehead is a well qualified expert in income tax matters and has done very little other work since about 1935 [Rep. Tr. pp. 2762-2763]. With respect to plaintiff's contention that Mr. Irvine's gifts of Irvine Company stock should have been specifically reported as gifts in the returns, Mr. Whitehead testified in response to questions by plaintiff's counsel as follows:

> "Q. Well, in 1938, Mr. Whitehead, wasn't it a fact that the government required all charitable organizations to include in their income tax returns

gifts from any source that exceeded the sum of $3,000? A. I don't think so, sir.

Q. You don't think so? A. No.

Q. There were no requirements or regulations in that connection at all? A. Not for a charitable foundation. That was my understanding.

Q. Well, your understanding is based upon what source? Did you examine the laws, or are you referring to the regulations, or what? A. I am referring to my understanding of the law and the regulations." [Rep. Tr. p. 2790].

Plaintiff's argument that the Foundation's tax returns were not as complete as they should have been under the regulations is contrary to Mr. Whitehead's testimony that they complied with the regulations [Rep. Tr. pp. 2888-2891]. The same is true of plaintiff's contention that a copy of the Indenture of Trust should have been furnished to the IRS with Miss Price's affidavit (App. Op. Br. p. 108). A reading of the applicable regulations, Article 101.1 [Rep. Tr. p. 2888], is all that is required to establish the accuracy of Mr. Whitehead's opinion that a copy of the Indenture of Trust was not required by the IRS [Rep. Tr. p. 2878].

Plaintiff's contention, based upon the testimony of Mr. Cassels, that the Foundation should have filed a separate fiduciary return for the trust established by the Indenture (App. Op. Br. p. 108) is also lacking in merit. The basis for Mr. Cassels' opinion appears in the following portion of his testimony:

"Q. Is it your contention that under paragraph (4) of section 142 that the trustee, having received no income from the trust and the trust having resulted in no income to the trustee or the

> fiduciary, as it is stated here, in the year 1937, was required to file this form under subsection (4)? A. Well, my answer again to that is: If the trust had net income of $1,000 or over or a gross of $5,000 or over then there would be a duty to file a return." [Rep. Tr. p. 3583].

The statute expressly supports the view taken by Mr. Whitehead that no separate fiduciary return was required as to the Foundation's trust [Rep. Tr. pp. 2878-2879]. As stated in Mr. Cassels' testimony, the statute provides that a fiduciary return is not required unless the trust had net income of $1,000.00, or over, or a gross income of $5,000.00, or over. The Foundation's trust had no income whatever during Mr. Irvine's lifetime because the income on the trust property had been reserved to Mr. Irvine for life and was never a part of the trust.

The Foundation, like most other corporations, employed an expert to handle its tax matters, furnished him with full information about the trust and its ownership of Irvine Company stock and followed his advice as to the tax returns that were to be filed and the information that was to be included. As has been indicated, Mr. Whitehead's interpretation of the applicable tax regulations and his advices to the Foundation as to how and what they should report to the IRS were correct. However, even if Mr. Whitehead had been wrong and the Foundation had failed to supply some required data to the IRS, the plaintiff would not have been benefitted. Clearly no inference adverse to the Foundation's ownership of the trust property could be drawn from a misinterpretation of regulations by its tax accountant.

With respect to the Company tax returns, plaintiff asserts that the information supplied in Schedule F, Compensation of Officers, shows that Mr. Irvine had not transferred the subject 510 shares to the Foundation (App. Op. Br. p. 95). No such inference can be drawn.

The information supplied was:

> "James Irvine, President
> Time devoted to business—¾ths
> Percentage of Corporation stock owned—547 common
> Amount of compensation—$12,000.00" [Ex. 3; Rep. Tr. pp. 2777-2778].

During the war years, from 1941 to 1946, Mr. Whitehead traveled to Los Angeles to review and supervise the Irvine Company tax returns, because the firm was short of qualified tax men in the Los Angeles office [Rep. Tr. pp. 2763-2766]. Mr. Whitehead reviewed the Company returns after they had been prepared by others [Rep. Tr. pp. 2766-2768] and decided how various items should be treated on the returns [Rep. Tr. p. 2769]. Mr. Whitehead approved the listing of "547 common" as percentage of stock owned by Mr. Irvine with full understanding that Mr. Irvine had transferred 505 of these shares to the Foundation. The reason why this listing was not only proper but necessary appears in the following excerpt from Mr. Whitehead's testimony:

> "[Q] At the time that you made reference to the listing on Schedule F which shows under 'percentage of corporation stock owned common 547' you were aware of the existence of the trust be-

tween Mr. Irvine and The James Irvine Foundation, were you not? A. Yes.

Q. And you had been preparing The Foundation income tax returns for years prior to that? A. That is right.

Q. And you were aware of the information that appeared on The Foundation books with respect to the transfer of 505 shares of stock of The Irvine Company to The Foundation? A. Yes.

Q. What, then, when you saw this 547 under this listing, Mr. Whitehead, caused you to approve this, as you testified this morning? A. I think Mr. Irvine had an interest in here which was sufficient to require inclusion in this particular schedule.

Q. What interest are you talking about? A. He had a right to revoke the transfer, he had retained a right to the dividends and a right to vote.

Q. And to you that meant he was an owner? A. That's right. The purpose of this schedule in a corporate return is generally to permit the revenue agent to determine whether the salary is excessive, and if it is a closely held corporation the amount of salary would generally be compared with the total income and with his stock holdings to see whether it was excessive.

In this particular case it was apparent, I think, that Mr. Irvine's salary was not excessive.

Q. Is that because, as to income paid out in dividends with respect to the stock, that is subject to double taxation? A. That's right." [Rep. Tr. pp. 2860-2861].

The District Court reviewed and accepted the defendant's contentions based upon Mr. Whitehead's testimony, as follows:

> "They [defendants] assert that the income tax authorities desire the information requested in Schedules F and G for the purpose of passing upon the question as to whether the salaries of the officers of a corporation are reasonable so far as deductions are concerned and that the voting power or control of a corporation by a particular officer is an important consideration in that connection. James Irvine did retain the right to vote the stock in question during his lifetime and to receive the dividends thereon during his lifetime. Therefore, the defendants assert, and correctly so, that, for the purpose of control of the corporation in connection with salaries voted the officers and all other income tax purposes, James Irvine would be regarded by the Internal Revenue Service as the owner of the shares in question." [Clk. Tr. p. 166].

Plaintiff is also in error in her argument (App. Op. Br. pp. 17-18) that the listing of Mr. Irvine as an owner of the subject stock in the minutes of meetings of the shareholders of the Irvine Company is evidence that Mr. Irvine had not previously transferred the stock to the Foundation in trust. The error in plaintiff's reasoning is perhaps best illustrated by her amended complaint, in which it is alleged that plaintiff is the owner of 180 shares of stock of the Irvine Company [Amnd. Complt. p. 2; Clk. Tr. p. 5]. Plaintiff testified that in making this allegation, she did not intend to disavow her 1952 transfer of one-half of those shares in trust to her mother, reserving to herself a

remainder interest which will become possessory on her mother's death [Rep. Tr. pp. 1308-1310]. Plaintiff, with a remainder interest in the shares is of course an owner of them for some purposes just as Mr. Irvine with a life interest in the shares which he transferred to the Foundation was an owner for the purpose of exercising his reserved right to vote the stock at meetings of stockholders. The District Court so held, saying in part:

> "It was noted that in the minutes of the annual meetings of the stockholders of The Irvine Company referred to that James Irvine was treated as being the ostensible owner of the 510 shares of stock. While those shares had been endorsed in blank, they had not been transferred on the stock record book of the company. Therefore, of record James Irvine was the only person entitled to vote those shares. He reserved that right in the indenture of trust. He could not have voted them if they had been transferred. Therefore, so far as The Irvine Company was concerned, he was the owner of them for corporate voting purposes. . . ." [Clk. Tr. pp. 166-167].

Finally, plaintiff contends that the District Court erred in assigning to plaintiff the burden of proof as to the facts necessary to sustain her causes of action, including the non-delivery of the Indenture of Trust (App. Op. Br. p. 23) and the non-delivery of the certificates representing the subject stock (App. Op. Br. pp. 25-26). The plaintiff is here engaged in a moot argument.

The District Court found not only that plaintiff had failed to establish the non-delivery of the Indenture

of Trust and the certificates representing the subject stock, but *that the evidence preponderated in favor of a finding that these instruments were delivered to the Foundation by Mr. Irvine* [Clk. Tr. p. 168]. Accordingly, the District Court's finding of fact would have been the same even if the burden of proof had been placed on defendants to disprove plaintiff's allegations of non-delivery.

Moreover, the District Court did not err in placing the burden of proof on plaintiff. State law governs all questions of substantive law in an action invoking the diversity jurisdiction of a federal district court. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817 (1938). The allocation of the burden of proof is a question of substantive law. *Palmer v. Hoffman,* 318 U.S. 109, 63 S. Ct. 477 (1943). Hence a federal district court in a diversity case must allocate the burden of proof according to state law, which in this case is the law of California.

Under the law of California, the burden is on plaintiff to prove all of the facts necessary to establish her claim for relief. The California Evidence Code specifically so provides in section 500 (formerly Calif. Code of Civ. Proc. § 1981):

> "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

Plaintiff's claim is that the Foundation holds the property of the trust established by the 1937 Indenture on a resulting trust for the benefit of plaintiff and the other beneficiaries of Mr. Irvine's estate. Thus, the burden of proving all of the elements necessary to es-

tablish a resulting trust is on the plaintiff. *Socol v. King,* 36 Cal. 2d 342, 348; 223 P. 2d 627, 631 (1950).

More specifically, plaintiff alleges that the ownership of the subject stock was not transferred to the Foundation because neither the Indenture of Trust nor the certificates representing the stock were delivered by Mr. Irvine. Accordingly, plaintiff has the burden of proof as to all facts necessary to establish the alleged non-delivery of the Indenture of Trust and the certificates representing the subject stock.

> *Chaffee v. Sorensen,* 107 Cal. App. 2d 284, 236 P. 2d 851 (1951).

In *Chaffee v. Sorensen,* the plaintiff commenced an action to quiet title to real property and to cancel a deed executed by the plaintiff's deceased husband to his daughter. The plaintiff alleged non-delivery of the deed. The evidence disclosed that the decedent executed the deed in the presence of his daughter, but that the daughter did not receive possession of the deed; that subsequent to the date the deed was executed, decedent, in a legal proceeeding, by way of verified answer and testimony, stated he owned the property; and that the deed was found in the donor's desk when he died at which time it was recorded in the daughter's name. The court held that the plaintiff had not sustained the burden of proving the alleged non-delivery of the deed. In the words of the opinion:

> "The burden of proof rested upon plaintiff to prove every element of her case including the alleged nondelivery of the deed. Having failed to sustain the burden which the law casts upon her, and the court having resolved the conflicts, if any,

in the evidence and upon the evidence and reasonable inferences drawn therefrom having rendered judgment against her, she cannot prevail on this appeal."

107 Cal. App. 2d at 291-292, 236 P. 2d at 855.

The rule applied in the cases relied upon by plaintiff is the same as the rule applied in the *Chaffee v. Sorenson* case. The burden of proof is placed on the party who affirmatively seeks to recover property from another who has the legal title or possession of the property. For example, *Lawson v. Lowengart,* 251 Cal. App. 2d 98, 59 Cal. Rptr. 186 (1967) cited by plaintiff (App. Op. Br. p. 23) was an action to quiet title brought by a plaintiff who had both possession and title to the property. The defendants in the case were affirmatively seeking to recover the property from the plaintiff on the theory that the plaintiff's decedent had conveyed the property to them and the court properly allocated to the defendants the burden of proving the delivery of the instrument on which their right to recover the property depended. On the other hand in *Chaffee v. Sorensen,* cited *supra,* the burden was allotted to the plaintiff to prove *non-delivery* of the deed since the plaintiff was affirmatively seeking to recover property from a defendant who held the title to the property.

In the case at bar, plaintiff is affirmatively seeking to recover property from the Foundation, to which it has both the title and possession and the District Court correctly assigned to plaintiff the burden of proof as to all facts necessary to establish the alleged non-delivery of the Indenture of Trust and the certificates representing the subject stock.

We respectfully submit that the District Court did not err in finding that the Indenture of Trust and the letter of June 20, 1946 were delivered by Mr. Irvine and that the Foundation, as trustee, thereby became the owner of the subject 510 shares of Irvine Company stock.

III.

The Foundation Became the Owner of the Subject 510 Shares of Irvine Company Stock by Delivery of the Certificates Representing the Shares Endorsed in Blank.

Plaintiff does not challenge the settled rule in this State, and elsewhere, that the ownership of corporate stock may be validly transferred as between the parties to the transfer by delivery of an endorsed certificate representing the stock. This is one of the methods of transferring title to shares of stock authorized by the Uniform Stock Transfer Act which was adopted in California in 1931 and remained in effect until January 1, 1965. Calif. Corp. Code § 2466 (formerly Calif. Civil Code § 330.1). While the statute, as appears from the cases cited in part II, *supra*, does not limit the means by which the ownership of shares of stock may be validly transferred as between the parties, it does codify the general rule that delivery of an endorsed certificate is sufficient to effect a valid transfer of the shares of stock represented by the certificate. *Oakland Scavenger Co v. Gandi,* 51 Cal. App. 2d 69, 124 P. 2d 143 (1942); *Hynes v. White,* 47 Cal. App. 549, 190 Pac. 836 (1920); *Coward v. DeCray,* 38 Cal. App. 290, 176 Pac. 56 (1918).

The evidence in the record in this case establishes beyond any plausible doubt that the certificates repre-

senting the shares of stock conveyed by the Indenture of Trust and Mr. Irvine's letter of June 20, 1946, were endorsed in blank and delivered to the Foundation by Mr. Irvine, and the District Court so held, saying in part:

> "The Court is of the view that the plaintiff has failed to establish the nondelivery of the certificates for those shares of stock. The Court is of the further view that the evidence preponderates in favor of a finding that, following the execution of the indenture of trust dated February 24, 1937, and his letter of June 20, 1946, James Irvine endorsed in blank the certificates described in those instruments and delivered them to the Foundation and thereafter during the lifetime of James Irvine the Foundation had in its possession certificates for 510 shares of Irvine stock, or those issued in lieu thereof, endorsed in blank. The Court makes that finding." [Clk. Tr. p. 168].

As is true with respect to substantially all of the District Court's findings, plaintiff argues on the basis of supposition and surmise that the quoted finding is clearly erroneous (App. Op. Br. pp. 19-21, 25-26, 52-56). Plaintiff asserts:

> "E. M. Price, who was the confidential secretary and agent of Mr. Irvine, as well as his agent and "dummy" secretary and treasurer of the Irvine Foundation, as trustee, knew that Mr. Irvine never intended that said trust would be complete, absolute or operative or effective during the lifetime of Mr. Irvine, and that is the reason that E. M. Price, as the employee and agent of James Irvine, had access to and the custody of the 510

shares of Irvine Company stock and the indenture of trust during the lifetime of James Irvine and following his death, and kept both the stock and the indenture of trust in Mr. Irvine's safe that was located in the private office of Mr. Irvine. Under these circumstances any possession of the Irvine stock and/or the indenture of trust by E. M. Price would be legally the possession of her employer James Irvine. . . ." (App. Op. Br. pp. 20-21).

This assertion is, of course, pure fantasy. There is no evidence in the record that would support such a story and plaintiff has discreetly omitted citations to the record to indicate its source.

Plaintiff's claim that the stock certificates and the Indenture of Trust were kept in Mr. Irvine's safe "in the private office of Mr. Irvine" is contrary to the direct testimony of Mr. George L. Beaubien, who was employed from 1917 until Mr. Irvine's death in 1947 as Mr. Irvine's bookkeeper. He testified:

"Mr. Young: On this 1937 trust indenture, where the Foundation is concerned as I understand your testimony, when is the first time that you saw that document, to your knowledge?

The Witness: Oh, I don't recall. I couldn't tell you.

Mr. Young: After you became Assistant Secretary?

The Witness: Oh, yes, after I became Assistant Secretary.

You see, we had two huge safes. Miss Price had one and I had one.

Mr. Young: You each had your own safe?

The Witness: Yes, we each had our own safe, and she kept all the Foundation records in her safe.

Mr. Young: Did you have the combination to her safe?

The Witness: No.

Mr. Young: Did she have the combination to your safe?

The Witness: Yes, she had the combination to mine.

Mr. Young: And there were records kept in the Foundation safe?

The Witness: Yes, Foundation records, yes.

Mr. Young: In her office that she had the safe in?

The Witness: Yes." [Rep. Tr. pp. 978a-978b].

* * * *

"Q. Were there any stock certificates kept in the safe in the office during this period 1937 to 1947? A. Absolutely not. Probably just overnight, that is all.

Q. But other than keeping something in there overnight, no stock certificates were kept in the safe at the office? A. Oh, no.

Q. During that period of years where were stock certificates and securities and bonds kept?. . . .

A. To my knowledge they were all kept in the safe deposit boxes." [Rep. Tr. pp. 901-902].

Plaintiff also contends that the finding that the stock certificates were delivered "is not supported by the substantial evidence in the case." (Specification of Error No. 12; App. Op. Br. p. 26). There is no

merit in this contention as appears from the following summary of some of the evidence which supports the finding.

During the course of planning and drafting the Indenture of Trust Mr. Spaulding, the attorney for Mr. Irvine in San Francisco, had correctly determined that for the purpose of establishing a valid trust and transferring ownership of the subject stock to the Foundation, the certificates evidencing the stock could remain in Mr. Irvine's name without endorsement and without delivery [Rep. Tr. p. 35]. Mr. McLaren, however, was fearful that the Treasury Department might attack the validity of the trust for tax purposes [Rep. Tr. pp. 33-35] and discussed the matter with Mr. Irvine and Mr. Scarborough, the attorney for the Irvine Company, during three days of conferences in June of 1936 [Rep. Tr. pp. 311-312]. The conclusion reached appears in the following excerpt from Mr. McLaren's testimony:

> "During the course of that meeting the then preliminary draft of the trust agreement as it related to the transfer of ownership from James Irvine to The James Irvine Foundation was discussed at length, and at that time it was decided that it would be a wise precaution, although perhaps unnecessary under the applicable state laws, to effect a manual delivery of the stock in question after its endorsement by Mr. Irvine, and that also to complete the transaction without any question that there should be a formal acceptance by The James Irvine Foundation of the stock through its appropriate officers." [Rep. Tr. p. 312].

Following the conferences, Mr. Scarborough by letter dated June 19, 1936, advised Mr. Spaulding of the dis-

cussion and suggested "that the certificates of stock remain in Mr. Irvine's name, but that they be endorsed by him and delivered to Miss Price, as secretary of the Foundation, . . ." [Ex. A-17, p. 2]. Mr. Spaulding's reply dated June 22, 1936 (with copy to Mr. Irvine) raised no question as to the suggested delivery to the Foundation of the endorsed stock certificates and stated that the trust instrument was satisfactory to him except for the wording of certain provisions not here relevant [Ex. A-18].

The Foundation was incorporated January 6, 1937 [Ex. A]. At the first meeting of directors, held on February 1, 1937, a resolution was passed authorizing Miss Price, the newly elected secretary of the corporation, to rent a safe deposit box at the vaults of the Crocker First National Bank of San Francisco [Ex. A-14, p. 26]. As to the reason the directors took this action, Mr. McLaren testified:

> "Originally in discussions with respect to the formation and operation of the trust it had been suggested that valuable papers be kept in the safe in Mr. Irvine's office. On further reflection—and I don't recall who the suggestion came from—it was pointed out that The Foundation was about to receive a majority of the stock of The Irvine Company, which was extremely valuable, and that therefore it would be wise to deposit that stock, The Moraga Company stock, and such items as the Articles of Incorporation and other valuable documents, in the safest place possible, and that is why the box was rented in the Crocker Bank and authorized at this meeting." [Rep. Tr. p. 50].

* * * *

"Q. And this resolution authorizing the taking out of a safe deposit box and designating the persons who should have access to that box, that was made in anticipation of the receipt of the stock that was to be granted to The Foundation under the indenture of trust? A. That is correct." [Rep. Tr. pp. 50-51].

The Indenture of Trust was executed on February 24, 1937 [Ex. A-1]. Less than sixty days thereafter on April 20, 1937, Miss Price rented safe deposit box number 9213 at the Crocker Bank [Exs. A-68; B-54]. Mr. Collum, who was employed at the bank as a vault attendant, assistant manager or manager in its safe deposit department from 1925 until his retirement in 1966 [Rep. Tr. pp. 525-526] recalled Miss Price coming in and selecting the box for the Foundation [Rep. Tr. pp. 610-611].

The "history card" which the bank maintained shows that the Foundation rented safe deposit box 9213 continuously from April 20, 1937 to July 22, 1965 [Ex. B-54; Rep. Tr. p. 542]. In accordance with the resolution adopted at the February 1, 1937 meeting of directors, only the officers, Myford Irvine, Paul A. Dinsmore and Miss Price, or any two of them, were authorized to enter the box [Exs. A-68, A-69; Rep. Tr. pp. 568-572]. Mr. Irvine could not have entered Box 9213 since he had no authorization to do so from the Foundation [Exs. A-14, p. 26; A-69] or under the box rental agreement with the bank [Rep. Tr. p. 623; Ex. A-68].

Sometime after execution of the Indenture of Trust and from one to four weeks prior to the meetings of members and directors on May 25, 1937 [Rep. Tr. p. 316] Mr. Irvine told Mr. McLaren that the stock certif-

icates had been endorsed and delivered to the Foundation. In response to questions by plaintiff's counsel, Mr. McLaren testified regarding the conversation as follows:

> "Q. Did Mr. Irvine ever tell you personally at any time that he had delivered the 505 shares of Irvine Company stock to The Foundation? A. Yes.
>
> "Q. When? A. That was some time—I can't fix the exact date, but it was some time before the annual meeting of the directors of The James Irvine Foundation, which, as I recall it, was held in May of 1937, and either on the telephone or at his office both he and Mr. Myford Irvine told me that the stock certificates in question had been endorsed and had been delivered to Myford Irvine and Miss Price as the responsible officers of The Foundation, and now that all that remained to be done was the formal ratification of acceptance of the gift by the two officers for The Foundation before The Foundation was in a position to function." [Rep. Tr. p. 316].

Mr. George L. Beaubien, Mr. Irvine's bookkeeper, also testified to the delivery of the certificates, in response to questions asked by plaintiff's counsel:

> "Q. Do you have any personal knowledge about that transaction, the 505 shares of Irvine Company stock into the Foundation? A. Well, I know this, that—of course, everything took place with common knowledge in the office, and when Miss Price received the 505 shares, why, she said, 'The transfer has been made.'
>
> Q. She told you that? A. Yes." [Rep. Tr. pp. 968-969].

Mr. Whitehead, the certified public accountant who prepared Mr. Irvine's tax returns from late 1936 or early 1937, until his death [Rep. Tr. p. 2762] also testified to the delivery of the stock in response to questions by plaintiff's counsel:

> "Q. Mr. Whitehead, you had notice, as I understood your testimony, that this 505 shares Irvine Company stock or an interest in it had come into the custody of the Foundation? A. Yes.
>
> Q. Is that right? A. Yes.
>
> Q. Did you have notice beside the books that you said you reviewed here this morning, the books maintained by Miss Price? A. Do you mean—I don't know what you mean by notice.
>
> Q. Well, had it come to your attention? A. Well, I had known for—*I had known since 1937 that the 505 shares had been transferred* pursuant to this indenture to The Foundation.
>
> Q. In addition to what you have testified appeared on the books? A. *Yes. I was told this,* and I read the—I read either the indenture or a copy of it.
>
> Q. Of the trust indenture back around the time that it was signed? A. Around that time." (Emphasis added). [Rep. Tr. pp. 2893-2894].

At the meetings of members and directors held on May 25, 1937, which were attended by Mr. Irvine [Rep. Tr. pp. 77-78] resolutions were adopted which "ratified, approved, confirmed and adopted" the "acts and deeds of Myford Irvine as President and E. M. Price as Secretary . . . in *accepting delivery* for and in behalf of this corporation as trustee under said In-

denture of Trust, *of the certificates of stock described in said Indenture of Trust, to-wit: 505 shares of the capital stock of The Irvine Company,* and 12,750 shares of the capital stock of The Moraga Company . . ." (Emphasis added). The resolution also provided that "this corporation . . . acknowledges and declares *that it holds said shares of stock and the certificates evidencing same* . . . as Trustee under said Indenture of Trust and subject to all rights and obligations of Trustee thereunder." (Emphasis added). [Ex. A-14, pp. 28, 31]. As has been discussed in part II, *supra,* the quoted portions of the minutes of the meetings are not only entitled to great evidentiary weight as a contemporaneous written record, they are *prima facie* evidence of the facts stated therein that Myford Irvine and Miss Price accepted delivery "of the certificates" representing the 505 shares of the Irvine Company stock on behalf of the Foundation and that it held "said shares of stock and *the certificates* evidencing the same" (Emphasis added) as trustee under the Indenture of Trust. Calif. Corp. Code § 832.

These facts are confirmed by all of Mr. Irvine's subsequent acts and declarations regarding his property interests. In 1946 Mr. Irvine told Mr. McLaren that "he only had left five shares of the stock of The Irvine Company" and that if they were added "to the shares already owned by The Foundation, that it would bring the total holding up to 51 percent, which would clearly establish control . . ." [Rep. Tr. p. 72].

Mr. Irvine's last will, which was executed on May 14, 1946, was prepared by Mr. Gerdes [Ex. B; Rep. Tr. pp. 1811-1812]. Prior to that time Mr. Irvine

had told Mr. Gerdes on a number of occasions that he had made a gift of 505 shares of Irvine Company stock to the Foundation in 1937 [Rep. Tr. pp. 1808, 1813]. In connection with the preparation of the will, Mr. Irvine also told Mr. Gerdes that he intended to give his only remaining five shares of Irvine Company stock to the Foundation and to revoke the trust as to the Moraga Company stock [Rep. Tr. pp. 1812-1813]. Other advices which Mr. Gerdes received from Mr. Irvine during the preparation and after execution of the will regarding the delivery of Irvine Company stock to the Foundation appear, in part, in the following portions of Mr. Gerdes' testimony:

> "Q. At or about the time that you were engaged in the preparation of Mr. Irvine's will did Mr. Irvine discuss with you any question related to the manner in which he had made transfer of the stock of The Irvine Company to The Foundation? A. Well, he told me that he had made this gift, that he had endorsed the stock in blank and delivered it to The Foundation, to Mr. Myford Irvine and Miss Price, as I recall it." [Rep. Tr. p. 1816].

On June 21, 1946, Mr. Sawyer, an attorney with the Hall firm, attended a conference with Miss Price and Mr. Irvine in Mr. Irvine's office. During this conference Mr. Sawyer was advised by Miss Price that The James Irvine Foundation *held* certificates of stock transferred to it by Mr. Irvine endorsed in blank, but without registration on the books of the company [Rep.

Tr. pp. 447-448; Ex. A-56]. This fact is recorded in Mr. Sawyer's letter to Mr. Irvine dated the following day, June 22, 1946, as follows:

> "In my discussion with you and Miss Price on June 21, it was brought to our attention by Miss Price that The James Irvine Foundation holds the stock certificates transferred by you to it endorsed in blank without registration on the books of corporations." [Ex. A-56].

Miss Price did not advise Mr. Sawyer of Mr. Irvine's gift of 5 shares of Irvine Company stock on June 20, 1946 or show Mr. Sawyer a copy of Mr. Irvine's letter to the Foundation of that date [Rep. Tr. p. 464]. Miss Price did, however, furnish Mr. Sawyer with a copy of the Indenture of Trust [Rep. Tr. pp. 454-455, 462]. Mr. Sawyer testified that the only information that he had as to "what shares of stock were in The Irvine Foundation which had been transferred by endorsement in blank by Mr. Irvine were shares referred to in the trust indenture." [Rep. Tr. p. 465].

By his June 22, 1946 letter, Mr. Sawyer correctly advised Mr. Irvine that under the law of California "delivery of an endorsed certificate passes a valid title irrespective of registration on the books", but continued that the law of the state of incorporation might control whether registration on the books was required [Ex. A-56]. After determining that the Irvine Company was a West Virginia corporation, he then advised Miss Price by telephone and Mr. Irvine by letter [Ex. A-57] that the law of that state was the same and that registration on the books of the company was not required. These contemporaneous written records, pre-

pared by a wholly disinterested witness, are unequivocal evidence that Mr. Irvine had delivered to the Foundation endorsed in blank certificates representing the shares he conveyed to it by the Indenture of Trust.

On cross-examination by plaintiff's counsel, Mr. Sawyer testified that he had been told by Mr. Irvine that the Irvine Company stock had been delivered to the Foundation:

> "Q. Mr. Sawyer, did Mr. Irvine ever himself personally tell you that he delivered any Irvine Company stock to The Irvine Foundation? A. To the best of my recollection not in numbers, but the fact was passed on to me.
>
> Q. What's that? A. The fact that shares had been delivered." [Rep. Tr. p. 468].

The delivery of the additional 5 shares of Irvine Company stock to the Foundation was accompanied by a letter from Mr. Irvine dated June 20, 1946. The letter states in substance that Mr. Irvine therewith handed to the Foundation four certificates representing 5 shares of Irvine Company stock, endorsed by him in blank as an addition to the trust property and that he revoked the trust as to the 12,750 shares of the Moraga Company stock and withdrew those shares from the trust [Ex. A-13].

Myford Irvine, as president, received and accepted the delivery of the certificates for the additional 5 shares of Irvine Company stock as an addition to the trust property. In accordance with the request in the letter that the Foundation acknowledge receipt of the certificates for the 5 shares of Irvine Company stock, Myford Irvine signed the receipt that appears beneath Mr. Irvine's signature, as follows:

"I hereby acknowledge receipt on behalf of The James Irvine Foundation from James Irvine of the above-mentioned certificates for five (5) shares of stock of The Irvine Company as an addition to said trust property as provided in the above-mentioned Indenture of Trust, dated the 24th day of February, 1937." [Ex. A-13, p. 2].

At the meeting of directors held on June 26, 1946, Mr. Irvine's letter of June 20, 1946 was read, Myford Irvine reported his acceptance of the 5 shares of Irvine Company stock and the following resolution was adopted:

"RESOLVED, that the said five shares of stock of The Irvine Company be and they are hereby accepted as an addition to the trust property provided for in that certain Indenture of Trust dated the 24th day of February, 1937, wherein James Irvine is Trustor and this corporation is Trustee; and, the act of the President in accepting said shares of stock be and the same is hereby ratified, confirmed and approved as the act and deed of this corporation." [Ex. A-14, p. 109].

The deliveries of the 505 and 5 shares of Irvine Company stock and the 12,750 shares of Moraga Company stock were also recorded in the Foundation's original books of account. From the incorporation of the Foundation on January 6, 1937, until Mr. Irvine's death in 1947, these books consisted of a "Cash Book and Journal" [Ex. A-76], and a "Ledger" [Ex. A-77]. The books were set up during 1937 and thereafter maintained by Miss Price [Rep. Tr. pp. 955, 958, 2865]. She did not keep the books on a daily basis but made entries periodically [Rep. Tr. p. 975]. On occasion she would

ask Mr. Beaubien or Mr. Whitehead for advice regarding the making of a particular entry in the books [Rep. Tr. pp. 975, 2830, 2865-2866]. The first entries in both books were made under date of December 21, 1937.

The Journal contains a listing, by year, of the property acquired and disposed of from 1937 to 1949 and its assigned value. For the year 1937, under date of December 21, appears the entry:

"The Moraga Company 1.
12750 shares
The Irvine Company 1.
505 shares
Surplus 2.
gift from James Irvine
as per terms of
Trust Indenture
dated February 24, 1937"
[Ex. A-76, p. 140].

For the year 1946, under date of June 26, appears the entry:

"Surplus 1
Moraga Company Stock 1
Trust revoked as to 12750 shares
of The Moraga Company stock
The Irvine Company stock 1
Surplus 1
5 shares gift of James Irvine
as per terms of Trust Indenture
dated Feb. 24, 1937
as per letter dated 6/20/46"
[Ex. A-76, p. 145].

The acquisition of the 505 and 5 shares of Irvine Company stock and the acquisition and disposition of the 12,750 shares of Moraga Company stock also appears in the "Ledger", with an appropriate cross-reference to the page in the Journal where the transactions are recorded [Ex. A-77, pp. 3, 4].

Mr. Irvine died on Sunday, August 24, 1947. His personal safe deposit boxes as well as the Irvine Company's box were sealed by the bank on Tuesday, August 26, 1947 [Ex. A-72; Rep. Tr. pp. 586-594]. Mr. Hall, as an attorney for the estate, made arrangements with the office of the Treasurer of the City and County of San Francisco to have the boxes opened and inventoried on September 10, 1947 [Rep. Tr. pp. 1038-1039, 1118-1120], and by letters dated September 3, 1947, Myford Irvine and Mr. Gerdes were advised of the appointment and invited to attend [Exs. B-55, B-56].

On September 10, 1947, Mr. Cames, the examiner from the treasurer's office [Rep. Tr. pp. 988, 1038-1039], accompanied by Myford Irvine, Miss Price, Mr. Hall and Charles S. Wheeler, Jr., the attorney for Mrs. Irvine, inventoried Mr. Irvine's safe deposit boxes [Ex. B-1; Rep. Tr. p. 1223]. There were three boxes in all, two at the Crocker Bank numbered 3550 and 4416 and one at the Wells Fargo Bank numbered 1412. The written inventory, which is titled Treasurer's Record Safe Deposit Examinations [Ex. B-1], was prepared by Mr. Cames in the vault as the boxes were opened and the contents examined [Rep. Tr. pp. 1226-1227]. It lists all of the contents of the boxes [Rep. Tr. pp. 1121-1122, 1232-1233]. The certificates representing the subject 510 shares of Irvine Company stock were not

found in the boxes [Ex. B-1; Rep. Tr. pp. 1232-1233, 1269-1270]. However, the certificates for the 12,750 shares of Moraga Company stock, which the Foundation had delivered to Mr. Irvine following the June 20, 1946 letter revoking the trust as to that stock, were found in Mr. Irvine's box number 4416 [Ex. B-1, p. 6] along with substantially all of the other stocks, bonds, notes and insurance policies owned by Mr. Irvine. The only Irvine Company stock certificates found in the boxes was the certificate for the 200 shares which Mr. Irvine held as trustee under the 1921 James Irvine, Jr. trust for the benefit of Athalie Irvine, the plaintiff in this action [Ex. B-1, p. 5].

The Irvine Company safe deposit box, which was No. 3867 at the Crocker Bank, was also opened and its contents were examined by Mr. Cames [Ex. B-1, p. 1; Rep. Tr. pp. 1234-1236]. There was no Irvine Company stock in the box [Rep. Tr. p. 1236]. The contents of the box were not listed in the inventory because it contained no property of Mr. Irvine and Mr. Cames was advised by the bank that Mr. Irvine had not signed the required signature card and had not had access to the box [Rep. Tr. pp. 1233-1235].

Mr. Hall having been present at the opening of all of the boxes and during the inventory of their contents by Mr. Cames [Rep. Tr. p. 1226], and having testified positively that the certificates representing the subject 510 shares of Irvine Company stock were not in the boxes [Rep. Tr. pp. 1236, 1240-1241], was questioned further by plaintiff's counsel in part as follows:

> "Q. Where was the stock? Where was the 510 shares of stock? A. As I have told you, I never have seen those certificates, but my understand-

ing has always been and it must be the fact that they were in the possession of The Irvine Foundation, because *they were delivered to the president and secretary of The Foundation by Mr. Irvine,* so I don't see any reason why they should have parted with possession after once having obtained possession." (Emphasis added). [Rep. Tr. p. 1268].

* * * *

"Q. Is there any place in the other, any schedule or any estate tax paper that is in the estate tax file where you refer to the 510 shares of stock, as to its location when Mr. Irvine died, where you say it was? A. No. I am quite sure there is not. I shouldn't know of my own knowledge where it was.

Q. You didn't know? A. No. I assumed that it was in the—I knew that the legal title and title right to possession was in The Irvine Foundation, but where those certificates were physically present, I don't know whether it was in a box, a safe deposit owned by The Irvine Foundation, or the safe belonging to The Irvine Foundation, I don't know." [Rep. Tr. p. 1275].

The Foundation's safe deposit box was not opened and inventoried following Mr. Irvine's death [Ex. B-1; Rep. Tr. p. 1223] since Mr. Irvine was not a member, director or officer of the Foundation and had no right of access to the box at any time [Ex. A-14, p. 26; A-69].

On September 19, 1947, a special meeting of the directors of the Foundation was held and after commemorating Mr. Irvine's death, the following resolution was adopted:

"RESOLVED, that the President and Secretary of this corporation be and they hereby are authorized and directed to take all steps and to do and perform all things, for and on behalf of this corporation, that may be necessary to cause the certificates of the capital stock of The Irvine Company, *heretofore transferred to and now held by this corporation,* to be transferred on the books of The Irvine Company and new certificates representing such shares to be issued in the name of this corporation." (Emphasis added). [Ex. A-14, p. 121].

Mr. Scarborough advised the directors at this meeting that before the Company could transfer the stock on its books, consents would have to be obtained from the Controller of the State of California and the Tax Commissioner of the State of West Virginia [Ex. B-3]. For the purpose of obtaining the needed consent from the West Virginia tax authority Mr. Scarborough, by letter dated October 9, 1947, forwarded an official application form to Myford Irvine and advised him as to the completion of the application in part as follows:

"Inasmuch as your father had long since transferred the legal title to the stock, *accompanied by delivery of the certificates,* to the Foundation, a negative answer to the first of the two questions set forth in the application would appear correct. . . ." (Emphasis added). [Ex. B-3].

After the consents were obtained [Exs. B-5, B-7] Miss Price, by letter dated November 7, 1947, sent certificates representing the 510 shares of stock of the Irvine Company "all in the name of James Irvine and all endorsed by him" together with the necessary

documentary stamps and the consents to the Irvine Company and requested that the shares be transferred into the name of the Foundation [Ex. D-2]. Miss Price wrote further under date of November 13, 1947, enclosing a copy of the Indenture of Trust, certified by her as secretary to be a true copy, and a copy of Mr. Irvine's letter to the Foundation dated June 20, 1946, with the explanation:

> "Mr. Scarborough wrote Myford he thought it would be well to file with you a copy of the trust indenture regarding the 505 shares of The Irvine Company stock and a copy of Mr. Irvine's letter regarding the final five shares given." [Ex. D-3].

The transfer of the stock on the books of the Company was accomplished by its secretary, Mr. Plum, on November 18, 1947 [Rep. Tr. pp. 2930-2932], and under cover of letter dated December 3, 1947, he forwarded to the Foundation a certificate representing 510 shares of Irvine Company stock issued in the name of the Foundation. [Ex. D-4; Rep. Tr. pp. 2928-2929].

In the Estate Tax Preliminary Notice, which was verified by Myford Irvine and filed under date of November 10, 1947, the 510 shares of Irvine Company stock are listed under the heading "Transfers During Decedent's Lifetime" with the following explanatory note: "These are the shares given the Foundation under instrument by which Mr. Irvine reserved dividends during life and also right to revoke gift or substitute other shares." [Ex. B-9].

The Inheritance Tax Affidavit, which was subscribed and sworn to by Myford Irvine and filed on June 10, 1949, contains the following with respect to the subject 510 shares of Irvine Company stock: "By

revocable Indenture of Trust, dated *February 24, 1937,* decedent transferred and assigned to The James Irvine Foundation, a California corporation, trustee, (a) 505 shares of the capital stock of The Irvine Company, a West Virginia corporation; . . . (b) *June 20, 1946,* by letter, decedent added to the trust estate under the above trust five shares of The Irvine Company. . . ." [Ex. B-16, Sch. 3].

The Estate Tax Return, which was signed under oath by both Myford Irvine and Robert H. Gerdes on January 23, 1949, contains the same provisions [Ex. B-15, Sch. N] and a note referenced to the listing of the 510 shares as item number 78 on Schedule B of the return which states that the shares were transferred by decedent "prior to death" to a charitable corporation [Ex. B-15, Sch. B].

Mr. Young questioned Mr. Whitehead about Schedule B to the Estate Tax Return, in part as follows:

> "Q. Schedule B, 'Stocks and Bonds,' and included in Schedule B is an item 78 for 510 shares of The Irvine Company at $11,000 per share. A. That's right.
>
> Q. Did you review this schedule— A. Yes.
>
> Q. At the time the estate tax was being prepared? A. Yes.
>
> Q. And you saw this figure of $5,600,000? A. Yes.
>
> Q. Is that right? A. Yes.
>
> Q. *And you knew at the time that the stock had been transferred during the lifetime of Mr. Irvine, is that right?* A. *Yes.*
>
> Q. Now there is a note over here, too, on the next page, Note 8. What does that say? A. Do you want me to read it?

Q. Yes. A. (Reading)

'These shares prior to death were transferred by decedent to a charitable corporation under the terms of a revocable trust (see Item 1 of Schedule N).'" (Emphasis added). [Rep. Tr. pp. 2902-2903].

The testimony and documents reviewed above establish beyond reasonable doubt that the certificates representing the shares of stock conveyed by the Indenture of Trust and Mr. Irvine's letter of June 20, 1946, were endorsed in blank and delivered to the Foundation by Mr. Irvine. Moreover, the evidence reviewed is uncontroverted and is not opposed by other evidence.

Plaintiff's argument that the certificates were not delivered is based in the main upon erroneous and wholly unsupported assertions regarding the exchange on April 21, 1941, of two certificates representing 173 of the 505 shares conveyed by the Indenture of Trust for seven new certificates representing the same shares. Plaintiff asserts:

"The substantial evidence is that on April 26, 1941 James Irvine was present at his home in Tustin, Orange County, California, and that on said date he attended a special meeting of the board of directors of The Irvine Company that was held at the office of the company near Tustin, California. It is therefore conclusive that James Irvine was present in person and personally surrendered certificates Nos. 33 and 42 to The Irvine Company on April 21, 1941, and personally received in lieu thereof the new certificates which were issued on the same date, to wit, April 21, 1941 [Ex. 2, Tr. 3647]. The fact that Mr. Irvine broke

certificates 33 and 42 into 7 new certificates in denominations as small as 5 and 10 shares on April 21, 1941, is substantial evidence that he never intended that the title to Irvine stock certificates 33 and 42 passed to The Irvine Foundation as trustee *in praesenti.* Furthermore, the possession by Mr. Irvine of certificates 33 and 42 on April 21, 1941, also supports the contention of the plaintiff that Mr. Irvine during his entire lifetime had the possession either personally or through his agent, E. M. Price, of all of said three certificates Nos. 28, 33 and 42 for the 505 shares of Irvine stock that are described in the indenture of trust." (App. Op. Br. pp. 14-15).

There is no evidence in the record to support plaintiff's conjecture that Mr. Irvine had certificates 33 and 42 in his possession or under his dominion or control or that it was Mr. Irvine who surrendered the certificates to the Company in 1941 in exchange for new certificates. This is pure speculation by the plaintiff for which there is no warrant in the evidence.

The fact is, as found by the District Court, that the record is silent as to the circumstances which surrounded the 1941 exchange of certificates [Clk. Tr. p. 167]. The only direct evidence regarding the exchange is the Company's stock record book, which contains the certificate stubs and the cancelled certificates [Ex. D-1]. This record discloses only that on April 21, 1941, certificates 33 for 132 shares and 42 for 41 shares, which were in the name of and endorsed in blank by Mr. Irvine, were cancelled in exchange for seven new certificates which were also issued in the name of Mr. Irvine and in turn endorsed by him in blank. The new

certificates, numbered 45, 46, 47, 48, 49, 50 and 51, representing the same 173 shares previously represented by certificates 33 and 42, were the certificates which were submitted by Miss Price in November 1947 for transfer on the books of the Company. They were accompanied by the original certificate 28 for 332 shares and certificates 34, 43, 44 and 53 for the last 5 shares transferred to the Foundation [Ex. D-2]. These certificates represented the total of the 510 shares which were conveyed to the Foundation by the Indenture of Trust and Mr. Irvine's letter of June 20, 1946. The shares were registered on the books of the Company in the name of the Foundation on November 18, 1947, and were thereafter represented by certificate 54 issued in the name of the Foundation [Ex. D-4; Rep. Tr. pp. 2930-2932].

When certificates 28, 33, and 42 were originally issued by the Company in 1909, 1923, and 1935, respectively, Mr. Irvine expressly acknowledged receipt of the certificates by signing the printed receipt on the stubs for those certificates [Ex. D-1]. However, the certificate stubs for the seven new certificates (Nos. 45, 46, 47, 48, 49, 50, and 51) that were issued in place of certificates 33 and 42 contain no such acknowledgment. The receipts printed on the stubs for the new certificates are unsigned. Accordingly, there is no evidence whatever as to the identity of the person who received custody of the new certificates when they were issued in exchange for certificates 33 and 42 on April 21, 1941.

Plaintiff argues that the stockholders' certificate record [Ex. 11] shows that Mr. Irvine personally surrendered certificates numbered 33 and 42 and personally received the new certificates issued in exchange, num-

bered 45, 46, 47, 48, 49, 50 and 51 (App. Op. Br. pp. 13-14). This is simply untrue. The record of Certificates Cancelled [Ex. 11, pp. 2, 4, 6, 8 and 10] contains a column titled "Left By" which is to indicate the name of the person who left the certificate for cancellation. With respect to the entries for cancellation of certificate 33 on page 4 and certificate 42 on page 6, the "Left By" column is not filled in, but is blank. The record of Certificates Issued [Ex. 11, pp. 3, 5, 7, 9 and 11] contains a column titled "Signature", which is to indicate the name of the person that received the certificate. With respect to the entries for the issuance of certificates numbered 45, 46, 47, 48, 49, 50 and 51 on pages 7 and 9, the "Signature" column is not filled in but is blank.

Myford Irvine and Miss Price, the officers of the Foundation who received and accepted delivery of all three certificates representing the 505 shares conveyed by the Indenture (as expressly appears in the minutes of the meetings of members and directors held on May 25, 1937 [Ex. A-14, pp. 28, 31]) may have made the 1941 exchange of certificates. Mr. Dinsmore, the other officer of the Foundation and the only other person who had access to its safe desposit box may have made the exchange. Or, any of the three Foundation officers may have given temporary custody of the certificates to Mr. Irvine for the purpose of making the change of certificates. However, no time need be wasted on this speculation since it is immaterial to the issues.

Under the express terms of the Indenture of Trust, the only way in which Mr. Irvine could divest the Foundation of its title to the shares and reacquire title in himself was "by written instrument filed with the

Trustee" [Ex. A-1, p. 2]. No such instrument was ever filed with the Foundation. Moreover, it is clear from the evidence reviewed above that Mr. Irvine had no desire or intention to reacquire title to the shares that he had previously conveyed to the Foundation. To the contrary, as expressed to Mr. Gerdes during preparation of Mr. Irvine's will in 1946, (more than five years after the exchange of certificates) Mr. Irvine had already transferred 505 shares and desired to also give his *last 5* shares to the Foundation [Rep. Tr. pp. 1812-1813]. The transfer of the additional five shares of Irvine Company stock was carried out at the same time and by the same "written instrument filed with the Trustee" by which Mr. Irvine revoked the trust as to the Moraga Company stock and reacquired title to those shares on June 20, 1946 [Ex. A-13].

Finally, as a matter of law, neither the possession of certificates 33 and 42 by Mr. Irvine in 1941, nor their exchange for new certificates by him, would have affected the title to the shares which was acquired by the Foundation in 1937 by Mr. Irvine's delivery of the certificates endorsed in blank and the formal acceptance of the delivery by the directors of the Foundation at their May 25, 1937 meeting. *Crane v. Reardon,* 217 Cal. 531, 20 P. 2d 49 (1933); *Hynes v. White,* 47 Cal. App. 549, 190 Pac. 836 (1920); *Coward v. DeCray,* 38 Cal. App. 290, 176 Pac. 56 (1918).

In the *Coward v. DeCray* case, Mrs. Wilkins owned certain shares of bank stock. She endorsed the certificates representing the stock to her niece and delivered them to her attorney, with instructions that he was to hold them until her (Mrs. Wilkins') death and then deliver them to the niece. Six weeks after this oc-

curred, Mrs. Wilkins obtained possession of the stock certificates from her attorney, had them reissued in her name and retained possession of the new certificates until her death. The niece, to whom the certificates had beeen endorsed, brought an action against the executrix of Mrs. Wilkins' estate to recover the stock. The trial court held that title to the stock had passed to the niece when the certificates were delivered to the attorney, and the executrix appealed. The California Court of Appeals affirmed the judgment holding, *inter alia:*

> ". . . [T]he evidence shows that Mrs. Wilkins intended to make, and did make, an absolute gift *inter vivos* of the stock. She told her attorney that she wanted to give the stock to Mary, her niece, that she wanted her to have it at the time of her death, and that she wanted the delivery made so there would be no administration. Maher, the attorney, testified that he advised her that she could not avoid an administration of her estate unless she made an absolute delivery of the indorsed stock certificates during her lifetime, such delivery, to be either to Mary direct, or to Maher for her, with the understanding that the delivery must be beyond recall. She thereupon proceeded with the transaction and made the delivery to Maher for Mary, and directed him to give the certificates to Mary at the time of her (Mrs. Wilkins') death. The effect of such a delivery is to vest a present title in the grantee subject to a life interest in the grantor [citations omitted], and *no subsequent act of the grantor, such as a retaking of the certificates, can detract from the title which has already vested in the grantee.*" (Emphasis added).
>
> 38 Cal. App. at 292-293, 176 Pac. at 57.

We respectfully submit that the District Court did not err in finding that following the execution of the Indenture of Trust and letter of June 20, 1946, Mr. Irvine endorsed in blank the certificates described in those instruments and delivered them to the Foundation and that thereafter during the lifetime of Mr. Irvine the Foundation had in its possession certificates endorsed in blank representing the subject 510 shares of Irvine Company stock.

IV.

A Valid Inter Vivos Trust Was Established by the Indenture of Trust Dated February 24, 1937.

Under California law, a trust is created, as to the trustor, by any words or acts of the trustor indicating with reasonable certainty an intention on his part to create a trust and the subject, purpose and beneficiary of the trust. Calif. Civil Code § 2221. A trust is created as to the trustee by any words or acts of the trustee indicating, with reasonable certainty, an acceptance of the trust and the subject, purpose and beneficiary of the trust. Calif. Civil Code § 2222. The mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission. Calif. Civil Code § 2251. When a trust is declared in writing all previous declarations of the trustor are merged therein. Calif. Civil Code § 2254.

The Indenture of Trust entered into between Mr. Irvine, as trustor, and the Foundation, as trustee, under date of February 24, 1937, indicates with complete certainty Mr. Irvine's intent to create a trust, the subject, purpose and beneficiaries of the trust, and its accept-

ance by the Foundation as trustee. Moreover, as discussed in parts II and III, *supra,* Mr. Irvine made a present transfer of the trust property, 510 shares of Irvine Company stock, to the Foundation by delivery of the Indenture of Trust and his letter of June 20, 1946, as well as by delivery of the certificates representing the shares endorsed in blank. All of the legal requirements for establishment of a trust under California law were thereby satisfied and the District Court held that a valid trust was established by the Indenture of Trust [Clk. Tr. p. 185].

Plaintiff in this Court, as in the District Court, contends that an *inter vivos* trust was not established by the Indenture of Trust, but that it was an ineffectual attempt to make a testamentary disposition of the subject stock and "created a mere agency" (App. Op. Br. p. 49). The District Court separately considered and rejected plaintiff's contentions, concluding: "It is the view and holding of this Court that the transfers of the stock were not testamentary in character." [Clk. Tr. p. 179] and "It is the view and holding of the Court that the contention of the plaintiff that the relationship of the Foundation to the shares of stock here in question was that of a mere agent is not well founded." [Clk. Tr. p. 183].

Plaintiff bases her claim that these findings are clearly erroneous on the fact that Mr. Irvine had the power to revoke the trust in whole or in part by a written instrument filed with the trustee and reserved to himself during his lifetime the right to receive the dividends, the right to vote the stock and the obligation to pay the taxes and expenses necessary to preserve and maintain the trust property. Plaintiff argues that the reservation of these life interests followed by

the provision that after the death of the trustor all dividends and other income and profits of the trust property were to be paid to the trustee and devoted to the uses and purposes of the trust shows that "no powers or duties whatever, nor any right, title or interest in The Irvine Company stock is given to the trustee until after the death of James Irvine" (App. Op. Br. p. 47).

Plaintiff's argument is unsound in fact and as a matter of law. The Indenture begins by making a present and unrestricted transfer of title to the stock to the Foundation, as clearly appears from the words of the instrument:

> "That the Trustor *hereby transfers, assigns and conveys* to the Trustee, to have and to hold in trust, nevertheless and for the following trust uses and purposes, the following securities, to-wit:
>
> "—505—shares of the capital stock of The Irvine Company, . . ." (Emphasis added). [Ex. A-1, p. 1].

The subsequent reservation by the trustor of certain life interests in the stock and the power by a written instrument filed with the trustee to revoke the trust in no way affects the present transfer of ownership of the stock to the Foundation by the quoted grant. By the terms of the grant, the ownership of the stock vested immediately in the Foundation. The trustor's reservation of the right to vote the stock and to receive the dividends only delayed the use and enjoyment of the property; it did not defer the transfer of ownership. Similarly, the reservation of the right to revoke the trust did no more than to give the trustor the power to divest the Foundation of its title at some future date.

This was the finding of the District Court and it is the only conclusion that reasonably can be drawn from the language of the Indenture and the testimony of the witnesses reviewed in parts II and III, *supra*; and it is mandatory under the established law of this state, *Tennant v. John Tennant Memorial Home,* 167 Cal. 570, 140 Pac. 242 (1914); *Nichols v. Emery,* 109 Cal. 323, 41 Pac. 1089 (1895); *Dingwell v. Seymour,* 91 Cal. App. 483, 267 Pac. 327 (1928).

As noted by the District Court the landmark case in this area of California law is *Nichols v. Emery,* cited *supra.* In that case the plaintiff's father, during his lifetime, conveyed to the plaintiff certain property in trust with the provision that within ten months after the death of the trustor the property was to be sold and the proceeds divided among his children in the manner specified in the trust deed. The power to revoke the trust was expressly reserved to the trustor, but no mode for exercising the power was prescribed in the trust instrument.

Plaintiff was unable to sell the property within ten months after the trustor's death and subsequently brought an action, joining the other beneficiaries as defendants, to obtain an order permitting him to sell the property after the time limit imposed by the trust instrument. The trial court concluded, as a matter of law, that the trust deed was testamentary in character and void for want of execution with the formalities prescribed for wills. This conclusion was based upon the court's finding:

> " 'That it was not the intention of the said Walter E. Nichols when he executed the said instrument and delivered the same, nor of said Wal-

ter R. Nichols when he received the same, that said instrument should pass any immediate interest in said lands to said Walter R. Nichols, but it was intended that said Walter E. Nichols, the grantor in said deed, might use, possess, and occupy said lands and the products thereof during his life, and might make during his life any disposition of said lands that he might choose other and different from that determined upon in the said instrument, and said Walter E. Nichols did from the date of said instrument up to his death use and occupy said lands and take to himself the entire product thereof.'"

109 Cal. at 327, 41 Pac. at 1090.

The California Supreme Court reversed the judgment on the grounds set forth in the following portion of the opinion:

"[T]o the creation of a valid express trust it is essential that some estate or interest should be conveyed to the trustee, and, when the instrument creating the trust is other than a will, that estate or interest must pass immediately. (Perry on Trusts, sec. 92.) By such a trust, therefore, something of the settler's estate has passed from him and into the trustee for the benefit of the *cestui,* and this transfer of interest is a present one and in nowise dependent upon the settler's death. *But it is important to note the distinction between the interest transferred and the enjoyment of that interest. The enjoyment of the cestui may be made to commence in the future and to depend for its commencement upon the termination of an existing life or lives or of an intermediate estate.* (Civ. Code sec. 707.)

"Did the grantor in the present case divest himself by the instrument of any part of the estate in the land which he had formerly owned and enjoyed? By the terms of the instrument an estate was assuredly conveyed to the trustee. The language is appropriate to a conveyance, and the grantor's execution and delivery of the deed . . . operated to vest so much of his estate in the trustee as was necessary to carry out the purpose of the trust. . . . We have, therefore, an estate conveyed to a named trustee for named beneficiaries, for a legal purpose and a legal term, such a trust as conforms in all its essentials to the statutory requirements. *That no disposition is made by the trust of the interest and estate intervening in time and enjoyment between the dates of the deed and the death of the settler cannot affect the trust. The trustee takes the whole estate* necessary for the purposes of the trust. All else remains in the grantor. (Civ. Code, sec. 866.) *In this case there remained in the grantor the equivalent of a life estate during his own life, and he was thus entitled to remain in possession of the land, or lease it and retain the profits.*

"Nor did the fact that the settler reserved the power to revoke the trust operate to destroy it or change its character. He had the right to make the reservation (Civ. Code, sec. 2280), *but the trust remained operative and absolute until the right was exercised in proper mode. . . .*

"We think, however, that the circumstances of the reservation of power to revoke, and the limitation of the trust upon the life of the settler, have

operated to mislead the learned judge of the trial court. If the life selected had been that of a third person, and if no revocatory power had been reserved, no one would question but that a valid express trust had been created. But the fact that the designated life in being was the settler's could not operate to destroy its validity, for he had the right to select the life of any person as the measure of duration. And the fact that he reserved the right to revoke did not impair the trust, nor affect its character, since title and interest vested subject to divestiture only by revocation, and if no revocation was made, they became absolute.

"A man may desire to make disposition of his property in his lifetime to avoid administration of his estate after death. Indeed, in view of the fact, both patent and painful, that the fiercest and most expensive litigation, engendering the bitterest feeling, springs up over wills, such a desire is not unnatural. And when it is given legal expression, as by gifts absolute during life, or by gifts in trust during life, or voluntary settlements, *there is manifest, not only an absence of testamentary intent, but an absolute hostility to such intent.*" (Emphasis added.)

109 Cal. at 330-332, 41 Pac. at 1091-1092.

The California Supreme Court gave a definitive statement of the conditions that must exist before an instrument may be voided on the ground that it is testamentary in nature in its holding in *Tennant v. John Tennant Memorial Home,* cited *supra,* as follows:

"An instrument is declared to be testamentary in nature only when, and because, it appears from its

terms that the intention of the maker thereof was that it should not be operative as a conveyance or disposition of the property, or of any interest, present or future, therein, until his death. This is always essential. *If the instrument, according to its proper legal effect under the rules of conveyancing, passes at the time of its execution a present interest or title in the property to a third person, although it may be only an interest in a future estate and may be subject to defeat on the happening or nonoccurrence of a future event, it is a present conveyance and not a will.* We do not think the fact that if the grantor had not at that time made this deed, but instead had made her will giving this property to the respondent, she would then have continued to enjoy the property until her death, in the same manner and as fully as she did thereafter enjoy it by reason of her reservation in the deed of an estate therein during her life, constitutes a reason for holding the deed to be a testamentary disposition. *Notwithstanding these reservations and this privilege of enjoyment, she did then, in fact and in law, convey to the grantee the future estate which, at her death, became an estate in possession, to said grantee. The deed was not the same, in effect, as a will. It passed a present interest in the remainder, upon the contingency that the grantor should not, during her life, convey to another, or revoke the deed.* The will would have had no such effect. The contingencies did not happen, hence the estate is now absolute." (Emphasis added).

167 Cal. at 579, 140 Pac. at 246-247.

The *Dingwell v. Seymour* case, cited *supra,* involved a contest between two sets of trustees claiming under competing trusts of the same property. The trustee, whose claim was based upon instruments subsequent in time, assailed the prior trust on the ground, among numerous others, that it was passive during the trustor's lifetime. The reservation in the trust instrument was as follows:

> " 'It is expressly agreed and understood by and between the parties hereto that the party of the first part reserves to herself a life estate in and to all the property herein conveyed, and shall be entitled to the management thereof, and to the revenues arising therefrom, for the period of her natural life, and shall in like manner during said time be responsible for the care, maintenance and preservation of the same.' "

The trial court held the trust to be null and void. The California Court of Appeals held the trust to be valid and reversed the judgment, saying:

> "We think that the argument of respondent is based on a false conception of the meaning and purpose of the life estate. In the first place, the life estate was never a part of the trust scheme. It is an estate authorized by the Civil Code and was by express terms in the instruments themselves carved out of and reserved from the properties—the trust *res*—conveyed to the trustee. By general provisions the trust was not to be put into operation during the lifetime of the trustor. *By her deeds she vested a present title in the trustee subject to the life estate and subject to the trust to be put into operation after her death. By her deeds*

> *Mrs. Olmsted conveyed to her trustees, to the appellants, a vested future interest in her properties described in said three deeds.* (Secs. 693 and 694, Civ. Code.) In imposing upon herself the responsibility for the care, maintenance, and preservation of her properties, out of which she carved her life estate, she did nothing more than to express in words what the law implies as to the duties and responsibility of a life tenant. . . ."
>
> 91 Cal. App. at 500-501, 267 Pac. at 334.

The decisions in the foregoing cases are a complete answer to the plaintiff's argument that the Indenture of Trust was an invalid attempt to make a testamentary disposition of the subject stock and created a mere agency. That, of course, is not surprising, since Mr. Scarborough relied in part upon those very cases in drafting the Indenture of Trust and in advising Mr. Irvine in 1936 that it was legally sufficient to establish a valid *inter vivos* trust [Ex. A-17]. It will also be recalled that ten years later, in July of 1946, Mr. Sawyer relied upon one of the cases in advising Mr. Irvine:

> "In our opinion the rule of *Nichols v. Emery* supra, is still followed to its letter and the trust is valid." [Ex. A-57].

The opinions expressed by Messrs. Scarborough and Sawyer, a decade apart, were correct when they were written and they remain so to this day. *Gordon v. Barr,* 13 Cal. 2d 596, 91 P. 2d 101 (1939); *Hill v. Conover,* 191 Cal. App. 2d 171, 12 Cal. Rptr. 522 (1961); *Oakland Scavenger Co. v. Gandi,* 51 Cal. App. 2d 69, 124 P. 2d 143 (1942); *Randall v. Bank of America,* 48 Cal. App. 2d 249, 119 P. 2d 754 (1941).

The facts in the *Oakland Scavenger Co. v. Gandi* case, cited *supra,* make it worthy of special mention. The court there upheld as valid a trust in corporate stock established by a resolution adopted at a meeting of stockholders, as follows:

> "'RESOLVED: That each of the stockholders endorse and deliver to the Oakland Scavenger Company the Certificate of Stock owned by him, and that in case of the death of any stockholder the Oakland Scavenger Company, be and it is hereby authorized and directed to transfer said Certificate of Stock to the son of the deceased person, if in the opinion of the Board of Directors of said Oakland Scavenger Company, the said son is qualified and capable of assuming the vacancy created by the decease of the father, and if said deceased stockholder leaves no surviving son, or if the said son, in the opinion of the Board of Directors of the Oakland Scavenger Company be not qualified and capable of assuming said vacancy, then the Oakland Scavenger Company, be and it is hereby authorized and directed to sell the said Certificate of Stock, and the shares represented thereby, at the best price obtainable from a person qualified and capable of assuming said vacancy, delivering the money so received from such sale to the surviving wife of said deceased stockholder, or if he leaves no surviving wife, to his heirs at law.'"
>
> 51 Cal. App. 2d at 74, 124 P. 2d at 146.

One of the questions presented for decision was whether the endorsement and deposit of a certificate of stock with the corporation pursuant to the resolution

was effective to create a trust in the stock. In holding that a valid trust had been created, the court considered whether the transfer was testamentary in nature or amounted to a mere agency and rejected both possibilities, saying in part:

> "In order to create a valid trust the transfer to the trustee need not be of a present interest, but may be of a future interest. All that is required is that an interest presently pass to the trustee. In *Tennant v. John Tennant Memorial Home, supra,* a grantor executed and delivered a deed absolute in which she reserved a life estate, power to revoke and power to sell. The court held that the same rules applied as to the case of a similar grant to a trustee, that an interest presently passed which saved the grant from being testamentary, notwithstanding the power of revocation and power of sale reserved. . . ."
>
> 51 Cal. App. 2d at 78, 124 P. 2d at 148.

The law of California, as established by the foregoing cases, is now also the law generally across the country. The Restatement of Trusts, upon which plaintiff relies, states the rule as follows:

> "Where an interest in the trust property is created in a beneficiary other than the settlor, the disposition is not testamentary and invalid for failure to comply with the requirements of the Statute of Wills merely because the settlor reserves a beneficial life interest or because he reserves in addition a power to revoke the trust in whole or in part, and a power to modify the trust, and a power to control the trustee as to the administration of the trust."
>
> 1 *Restatement of Trusts 2d,* § 57 at 151.

Plaintiff's brief contains a quotation of section 56 of the Restatement and comments a. and b. to that section (App. Op. Br., Appendix pp. 56-57), but omits comment f.:

> "*Postponement of enjoyment until settlor's death.* If by the terms of the trust an interest passes to the beneficiary during the life of the settlor, although the interest does not take effect in enjoyment or possession before the death of the settlor, the trust is not a testamentary trust. See § 57. The disposition is not testamentary and the intended trust is valid, even though the interest of the beneficiary is contingent upon the existence of a certain state of facts at the time of the settlor's death."
>
> 1 *Restatement of Trusts 2d,* § 56 at 149.

Professor Scott, on whom plaintiff also relies (App. Op. Br. Appendix p. 57) commented on the decision in *National Shawmut Bank of Boston v. Joy,* 53 N.E. 2d 113 (Mass. 1944), which cited and followed *Nichols v. Emery,* cited *supra,* as follows:

> "In other words, if the terms of the trust are clearly stated in the instrument, the disposition is not invalid as an unattested testamentary disposition merely because the settlor has reserved not only a life interest and a power of appointment and power to amend or revoke the trust, but also power to control the trustee in the exercise of its powers. In as much as the purpose of the Statute of Wills is to insure the carrying out of the considered wishes of the testator and to prevent fraudulent claims, it is believed that the decision is sound in emphasizing the definiteness in the ex-

pression of those wishes rather than making the validity of the disposition depend upon the mere question of the extent of the powers conferred upon the trustee. A well-drawn trust instrument is effective where it creates a trust inter vivos, even though the settlor reserves for himself during his lifetime power to control the trustee in the administration of the trust."

1 Scott, *Trusts* § 57.2, at 453 (2d ed. 1956).

Professor Scott also explains the reason behind the rule:

"In determining whether an agency rather than a trust is created, consideration is given not merely to the extent of the powers reserved by the settlor, but also to the nature of the [dispositive] instrument, . . . The purpose of the Statute of Wills in requiring certain formalities is to prevent fraudulent claims. If the disposition is evidenced by a formal trust instrument, the danger of fraud is not increased by the fact that the settlor may have reserved extensive powers."

1 Scott, *Trusts* § 57.2, at 52-53 (Supp. 1966).

It is readily discernible from the California cases reviewed above that a valid *inter vivos* trust is established even though the trustor reserves to himself for his lifetime all of the beneficial rights, powers and privileges incident to the trust property and conditions the beginning of the use and enjoyment of the trust property by the trustee and the beneficiary on the occurrence of his death. The decisions in those cases compel *a fortiori* the conclusion that the Indenture of Trust between Mr. Irvine and the Foundation established a valid *inter vivos* trust.

Mr. Irvine did not reserve to himself all of the proceeds of the trust property during his lifetime, as appears from the following provision of the Indenture:

> "Any proceeds or profits from the corpus of the trust property (as distinguished from income thereof), which may accrue during the lifetime of the Trustor, and also all liquidating dividends and all other payments to the Trustor or the Trustee out of capital (whether of any corporation whose stock is held hereunder or of any other trust property hereunder) other than as hereinabove specifically reserved to the Trustor, shall be paid to and shall be invested by the Trustee in such property or securities as may be approved by the Trustor, and all rents, interest, dividends and other income of any such investments shall, during the lifetime of the Trustor, be paid to and belong to the Trustor as his sole and separate property." [Ex. A-1, pp. 3-4].

The only trust proceeds and profits, other than income, reserved to Mr. Irvine were liquidating dividends and other withdrawals from or diminutions of capital which when paid would not constitute taxable income to him [Ex. A-1, p. 3]. Accordingly, during Mr. Irvine's lifetime the Foundation had the right to receive and the fiduciary obligation to obtain and invest all liquidating dividends, to the extent they exceeded Mr. Irvine's tax basis, and all capital gains distributions derived from the Irvine Company stock and, prior to June 20, 1946, the Moraga Company stock.

It should also be noted that the provision in the Indenture reserving to Mr. Irvine the right to revoke the trust by written instrument filed with the trustee does

not add to the power Mr. Irvine would have had without such a provision. California Civil Code § 2280, at all times since 1931 has provided, *inter alia:*

> "Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. When a voluntary trust is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust estate. . . ."

Plaintiff misconstrues and distorts the provisions of the Indenture of Trust in numbered paragraphs 1, 2, 3, 4 and 5 on pages 6 and 7 to make the argument:

> "It is therefore undisputed that there were no powers of any kind or any title to the Irvine Company stock vested in the trustee until after the death of the trustor. The reference that 'after the death of the Trustor' the trustee would be vested 'with the following additional powers and discretions' refer back to the first paragraph on page 4, which is hereinabove set forth and which is applicable to paragraphs 1, 2 and 3, pages 4 and 5, of the indenture of trust, as to the powers stated therein and which are to *become operative only after the death of the trustor.*" (App. Op. Br. p. 48).

These assertions are simply untrue. The Indenture expressly states that the matters set forth in numbered paragraphs 1-5 on pages 6 and 7 are *"additional* powers and discretions" (Emphasis added) [Ex. A-1, p. 6] and that the powers and discretions of the Trustee enumerated therein *"are not to be construed as a limitation* upon its general powers and discretions. . . ." (Emphasis added) [Ex. A-1, p. 7]. At no place in the Indenture are the general powers and discretions of the

Foundation as trustee in any way limited or restricted; nor does any provision of the Indenture relieve the Foundation of the obligations imposed upon it as trustee.

The powers, discretions and obligations of a trustee are conferred and imposed upon it by law and in California are specified, in part, in Civil Code §§ 2228-2239, 2258-2263 and 2267-2272. These statutes were recently applied by the Ninth Circuit Court of Appeals in upholding the validity of a trust under California law against the charge that it was a mere agency. *Dessar v. Bank of America National Trust & Savings Ass'n,* 353 F. 2d 468 (9th Cir. 1965).

The *Dessar* case involved a formal trust instrument that was made and was to be performed in California. Plaintiff sought to recover the trust property on the ground that the trust instrument only established an agency. The provisions on which plaintiff based this contention reserved to the trustor during her lifetime the right (a) to change or amend any of the provisions of the trust, (b) to increase or decrease the amount provided to be paid to any beneficiary, (c) to change the beneficiary or beneficiaries, (d) to revoke the trust in whole or in part, (e) to take out of the trust any part or all of the trust property, (f) to receive the income on the trust property, and (g) to direct the trustee with respect to the investment or other disposition of the trust property. A further paragraph of the trust instrument contained provisions that were applicable after the death of the trustor. They included (a) payment of the trustor's last illness and funeral expenses, (b) payment of inheritance and estate taxes, and (c) payments out of the corpus of the trust to various charities and relatives of the trustor.

The United States District Court for the Northern District of California, which had diversity jurisdiction, dismissed the action on the grounds that the plaintiff did not have capacity to bring the action and had failed to join indispensable parties. The Court of Appeals, with the consent of the parties, considered only the validity of the trust and affirmed the judgment, holding:

> "Taken by its 'four corners' the instrument looks like a conveyance in trust and was obviously intended to be one. While extensive powers are retained by the trustor, they are not so broad as to make the relationship one of mere agency. For example, the trustee is not fully relieved of its very broad duties in relation to investment under Civil Code, Sections 2261 and 2262, or under the various sections of the Code imposing fiduciary duties, such as §§ 2259-2260, 2228-2238, 2269, or of its powers under §§ 2267-2272. It must follow the trustor's written directions if given, and is protected by them. But we find nothing in the agreement relieving it of its duties when directions are not given. . . .
>
> "We hold that the trust was, during the life of the trustor, a true trust, not a mere agency, and that the trust is valid. . . ."
>
> 353 F. 2d at 473-474.

The plaintiff spends considerable time nit-picking purported fact differences between the *Dessar* case and the case at bar in an unsuccesful effort to distinguish away the holding in the *Dessar* case (App. Op. Br. pp. 43-46). However, as the District Court correctly noted in its Memorandum opinion, "the control retained by

the trustor in the trust instrument in that case was as great if not greater than the control retained by the trustor in the present case." [Clk. Tr. p. 182]. Accordingly, the *Dessar* case is precedent for the holding in this case that the Indenture of Trust entered into by Mr. Irvine and the Foundation established not a mere agency, but a valid trust.

The District Court's finding that the relationship of the Foundation to the subject stock was that of a trustee of a valid trust and not that of an agent is also challenged by plaintiff on the basis of repetitive undocumented and unsupportable assertions that the Foundation was the *alter ego* and agent of Mr. Irvine and under his dominion and control and that the officers of the Foundation, Myford Irvine, Paul A. Dinsmore and Miss E. M. Price, were the "dummies" and "tools" of Mr. Irvine. Plaintiff argues:

> "We have heretofore alluded to the fact that the Irvine Foundation and The Irvine Company were both *alter egos* of James Irvine. The Irvine Foundation was controlled and directed by Mr. Irvine to the same absolute degree that he controlled The Irvine Company during his entire lifetime. The directors of the Irvine Foundation Corporation and the officers thereof, to wit, his son Myford Irvine and his confidential secretary Miss E. M. Price, who were 'dummy' president and 'dummy' secretary-treasurer, and his employee Paul A. Dinsmore, who Mr. Irvine named as the 'dummy' vice president but who had no duties as such, all of whom were placed in their respective positions because they were the employees, agents and 'dummy' officers and directors of Mr. Irvine." (App. Op. Br. pp. 98-99).

There is no warrant in the evidence for the quoted assertions or those like them that are sprinkled throughout plaintiff's brief. They are pure make-believe, with no basis other than imagination and conjecture. The District Court expressly rejected the claim that Mr. Irvine had complete dominion over the Foundation on the ground that it "lacked evidentiary support" [Clk. Tr. p. 180] and found that Mr. Irvine *did not have* dominion over or control of the Foundation. In the words of the District Court's Memorandum opinion:

> "James Irvine, in connection with the incorporation of the Foundation, designated those who were to constitute its first Board of Directors. The Directors constituted all of the members of the corporation. Under its articles of incorporation the Board of Directors selected their own successors in office, and hence the Board was self-perpetuating. James Irvine was at no time a member of the Board of Directors or an officer of the corporation. Two members of his family were on the first Board of Directors, but they constituted a minority of the Board. It was his expressed desire that the Foundation not be a family controlled Foundation. James Irvine reserved no power to designate the successors in office to the members of the first Board of Directors or to remove any Director from office. There is nothing in the articles of incorporation purporting to give James Irvine dominion over and control of the Foundation. The minutes of the Board of Directors and the minutes of the Foundation do not contain any reference to the presence of James Irvine at those meetings. However, it appears from the testimony that he did attend some of those meetings. The

> record is silent as to the extent of his participation in the discussion and deliberation at those meetings. It seems clear that James Irvine did not have dominion over and control of the Foundation, the trustee under the indenture of trust." [Clk. Tr. pp. 180-181].

The total absence of evidentiary support also characterizes plaintiff's repeated assertions that the officers of the Foundation, Myford Irvine, Paul A. Dinsmore and Miss E. M. Price were the "dummies" and "tools" of Mr. Irvine. Each year for 22 consecutive years, from 1937 when the Foundation was first organized until his death in 1959, Myford Irvine was duly elected by the directors of the Foundation as its president. Paul A. Dinsmore was the duly elected vice-president of the Foundation from 1937 until his resignation as a member and director in 1950. Miss E. M. Price was duly elected as the secretary and treasurer of the Foundation each year from 1937 until her death in 1959 [Ex. A-14]. The fact that Myford Irvine and Miss Price for the first 10 of their 22 years of service to the Foundation were gainfully employed by Mr. Irvine and that Mr. Dinsmore during the period of his service to the Foundation was also an officer and director of The Irvine Company [Ex. 2] is no evidence at all that they were controlled or directed by Mr. Irvine in carrying out their fiduciary duties and obligations to the Foundation. Moreover, the record is barren of any evidence of an attempt to dominate or control the Foundation officers by Mr. Irvine. There is no evidence that he even made any suggestions or gave any directions to any of them in connection with their responsibilities as corporate officers of the Foundation.

The total lack of substance in plaintiff's assertions is demonstrated by the facts on which she relies for their support. Plaintiff argues:

> "It further appears from the minutes of the meetings of the members and directors of the Foundation corporation that Myford Irvine, 'dummy' president, when sending communications to the directors also used the personal letterhead stationery of his father James Irvine, as evidenced by his letter dated April 17, 1945 [Ex. A-14, Tr. 3678]. The first notice sent by E. M. Price on the personal letterhead stationery of James Irvine was dated May 22, 1939, and the last notice sent by her, was dated on or about June 10, 1947, and gave notice of the regular annual meeting of the members for June 10, 1947. This is further substantial evidence that during the entire 10-year period of Mr. Irvine's lifetime the Irvine Foundation corporation was nothing more than his *alter ego,* and as such *alter ego* the officers and directors thereof, who were his agents and employees, and who were known in corporation law as 'dummies', were dominated and controlled absolutely by James Irvine." (App. Op. Br. p. 110).

All of the notices of meetings and letters to directors referred to in plaintiff's argument were signed by Myford Irvine as president or by Miss Price as secretary of the Foundation. The only inference that reasonably can be drawn from the fact that the communications were typed on Mr. Irvine's stationery is that Mr. Irvine made his paper supplies available to the Foundation. In doing so, Mr. Irvine certainly cannot be said to have been exercising dominion or control over the Foundation or its officers.

The balance of plaintiff's argument on this issue consists of incomplete summaries of various bits of testimony and argumentative assertions about it which are patently inaccurate and unsupportable. For example, plaintiff quotes selected segments of the testimony given by Richard C. O'Connor in support of her contentions that:

> "The finding of fact of the District Court that Mr. O'Connor testified at the trial that he was of the view that the agency theory suggested by him in a letter dated August 6, 1949, was not well founded, is clearly erroneous [R. 180]." (App. Op. Br. p. 40).

And that:

> "This finding is contrary to the testimony of Mr. O'Connor which is set forth in the appendix to appellant's brief." (App. Op. Br. p. 41).

The assertion that the District Court's finding is contrary to the testimony of Mr. O'Connor is an outright falsehood. It is true that the finding is not supported by the selected segments of testimony which plaintiff chose to include in the appendix to her brief; but that is only because plaintiff omitted from the appendix the testimony and writings [Ex. J-1, J-3] of Mr. O'Connor in which he expressed the view that the agency theory suggested in his letter of August 6, 1949, was not well founded. Mr. O'Connor testified:

> "Q. Now, from this, the last entry here where you say Exhibit F, 'Trust for Foundation create mere agency,' question mark, and then in the handwriting note, does this refresh your recollection, Mr. O'Connor, that as of February 26, 1951, at the time of this conference with Mr. Hall and

Mr. Oliver, that the question as to the stock in the hands of The Foundation under the trust as mentioned in point fifth of your letter had not yet been resolved? A. No. It would indicate to me at least in my mind, it had been made up that *I was convinced that it was a valid trust.*" (Emphasis added). [Rep. Tr. p. 2647].

Mr. O'Connor also testified about the handwritten notes which he made on page 1 of Schedule 3 of the Inheritance Tax Affidavit in the margin adjacent to the statement of facts regarding the Foundation trust [Ex. J-1], in part, as follows:

"Q. In ink on the left-hand side in the margin, after this entry: 'To The James Irvine Foundation,' and approximately opposite the first paragraph, talking about the various provisions of the Indenture of Trust as to the reservation by the trustor, is some inked writing. Is that your writing? A. Yes. This is the paragraph that refers to the transfer of the 505 shares—

Q. That is correct. A. —to The Irvine Foundation.

Q. Yes, and the— A. I have a note opposite, in the left-hand margin, opposite that paragraph, handwritten by me:

'Is this a trust or mere agency which terminated at his death, property then passing to his estate? Extensive powers, et cetera, reserved, but title'—'title' underlined—'passed to trustee. *Believe trust.*'

Q. 'Believe trust,' is that right? A. Yes." (Emphasis added). [Rep. Tr. pp. 2703-04].

Handwritten notes which Mr. O'Connor made at and following his conference with attorneys for Mr. Irvine's estate on February 26, 1951 [Ex. J-3] were also the subject of testimony by Mr. O'Connor:

> "Q. All right. Then what is written just below that? A. *'Foundation—agency?'* That is followed by an inked notation, *'No.'*
>
> Q. And this inked notation, can you state when that was placed on the February 1951 notes? A. Sometime after the date, whenever that was, when the note itself was written.
>
> Q. All right. In other words, it appears at this February 1951 conference or time, whenever that is, there appears to have been a conclusion reached with respect to the point fifth in your letter? A. That is right." (Emphasis added). [Rep. Tr. p. 2682].

Much of the testimony of Mr. O'Connor which is quoted in the appendix to plaintiff's brief relates to hypothetical and assumed facts posed by plaintiff's counsel on redirect examination about Mr. Irvine's transfer of the subject stock to the Foundation in trust (App. Op. Br., Appendix pp. 9-13). However, plaintiff omitted the testimony of Mr. O'Connor on cross-examination which gave rise to the hypothetical questions that were asked by plaintiff's counsel on redirect examination. It was, as follows:

> "Q. At the time you wrote your letter of August 6, 1949 with respect to the point Fifth, the Foundation trust, had you done any independent legal research with respect to the validity of trusts in California or under California law unrelated to questions of taxes? A. Trusts in general?

Q. Yes, just a creation of inter vivos trusts under California Law. A. Yes. At that time I was teaching the subject of Trusts at the U.S.F. Law School at night, and had gone into the law from that aspect very thoroughly.

Q. Were you familiar—you were quite familiar with the law of California with respect to trusts, were you not? A. A lot more than I am right now.

* * * *

Q. The question was mentioned—there were some hypotheticals that were asked of you by Mr. Young about this stock and stock delivery. Did you recall reading the Indenture of Trust where it began:

> 'Witness that the trustor hereby transfers, assigns, and conveys to the trustee to have and to hold in trust nevertheless and for the following trust uses and purposes the following securities, to wit, 505 shares of the capital of The Irvine Company'?
>
> You recall reading that? A. Yes.

Q. What did that information convey to you with respect to the transfer of these 505 shares of stock? A. *This instrument, which is called an indenture of trust, was signed by Mr. James Irvine, Sr. as trustor, and I felt that under California law it would be sufficient in itself to give rise to the trust, whether shares were physically delivered or not, that the instrument—the delivery of this instrument to The Foundation would make the transfer valid.*" (Emphasis added). [Rep. Tr. pp. 2686-2688].

We respectfully submit that the District Court did not err in finding that a valid trust was established by the Indenture of Trust, that the transfers of the subject stock were not testamentary in character, and that the relationship of the Foundation to the subject stock was that of a trustee of a valid trust and not that of a mere agent.

V.

The Indenture of Trust Dated February 24, 1937 Established a Valid Trust for Charitable Uses and Purposes to Which the Rule Against Perpetuities and the Laws Prohibiting the Suspension of the Powers of Alienation Do Not Apply.

In California, charitable trusts are specifically exempted by the Constitution from the operation of rules against perpetuities. Article XX, Sec. 9, of the Constitution of California. This exemption in favor of charitable trusts extends also to laws prohibiting the suspension of the power of alienation. *Dingwell v. Seymour,* 91 Cal. App. 483, 267 Pac. 327 (1928); *Estate of O'Connor,* 158 Cal. App. 2d 187, 322 P. 2d 616 (1958); *Estate of McKenzie,* 227 Cal. App. 2d 167, 38 Cal. Rptr. 496 (1964).

The District Court found that the trust administered by the Foundation was "*a valid trust for charitable uses and purposes* under the California law exempting such trusts from the rule against perpetuities" (Emphasis added) [Clk. Tr. p. 174]. In making this finding, the District Court considered and rejected, as unsound in fact and law, all of the arguments that are made by the plaintiff in this Court, *i.e.,* that the trust is non-charitable because it excludes tax supported char-

ities from its benefits; it gives discretion to the trustee to add trust income to the capital of the trust; and it was established by Mr. Irvine for motives other than benefit to charity [Clk. Tr. pp. 169-174]. The findings and conclusions of the District Court are fully substantiated by the evidence and by the applicable authorities.

By statute in California all declarations of the trustor are deemed to be merged in the trust instrument. Calif. Civil Code §§ 2253, 2254; *National Bank v. Exchange Nat. Bank,* 186 Cal. 172, 199 Pac. 1 (1921); *Security First National Bank v. Wellslager,* 88 Cal. App. 2d 210, 218; 198 P. 2d 700 (1948). The Indenture of Trust sets forth in clear and unambiguous language the limitation that the trust property shall be used solely for charitable purposes. However, before reviewing the provisions of the Indenture, consideration should be given to the special rules of construction applicable to trusts in aid of charity under California law.

Gifts to charity are highly favored in the law of California and gifts in trust intended for charity must be liberally construed to uphold their validity whenever possible. *Estate of Tarrant,* 38 Cal. 2d 42, 237 P. 2d 505 (1951); *Dingwell v. Seymour,* 91 Cal. App. 483, 267 Pac. 327 (1928).

In the *Dingwell* case, the trust in issue was an *inter vivos* trust in which the trustor (like Mr. Irvine) had retained a life interest in the trust property. The court confirmed the validity of the trust and expressed the policy of liberal construction that applies to charitable trusts as follows:

> "[A] few quotations from leading cases and authorities on the attitude of courts toward charitable trusts are pertinent, since they have a direct bear-

ing on the laws of construction. 'Charitable trusts are the favorites of equity; they are construed as valid whenever possible, by applying the most liberal rules of which the nature of the case admits, and are often upheld where private trusts would fail.' (11 C.J. 307.) We quote a sentence from the *Estate of Hinckley,* 58 Cal. 457: '. . . courts look with favor upon all attempted charitable donations and will endeavor to carry them into effect, if it can be done consistently with the rule of law. A bequest intended as a charity is not void, and there is no authority to construe it to be legally void, if it can possibly be made good.' Again, from the *Estate of Dwyer,* 159 Cal. 680 [115 Pac. 242]: 'It is well settled here that dispositions to charity are looked upon with favor and courts will uphold all such gifts whenever made by a donor in his lifetime or by a trustor, when it can be done consistently with the rules of law'; and from the *Estate of Upham,* 127 Cal. 90 [59 Pac. 315]: 'It must be remembered that charities—both as to trustees and the beneficiaries—are more liberally construed than gifts to individuals.' 'An interpretation which gives effect is preferred to one which makes void.' (Sec. 3541, Civ. Code.)."

91 Cal. App. at 507-508, 267 Pac. at 337.

While these special rules of construction are applicable to the trust established by Mr. Irvine, there is little need to apply them to determine whether the trust is a charitable trust. The Indenture of Trust expressly provides that the income from the trust property "shall be used, applied and devoted by the Trustee *exclusively to or for the advancement of any*

charitable use or purpose in the State of California as now is or may hereafter be authorized in the Articles of Incorporation of the Trustee and as the Board of Directors of the Trustee shall from time to time, in its discretion, select and determine; provided, however, that no part of the net income or earnings of the trust property shall inure to the benefit of any member of The James Irvine Foundation, Trustee, *nor shall any part thereof be used, applied or devoted to or for any other purpose than as hereinabove specified. . . .*" (Emphasis added) [Ex. A-1, p. 5]. The Indenture also specifies how the trustee shall accomplish the "exclusively" charitable purpose:

> "Such income shall be used and applied by the Trustee, either by making donations or contributions to established charities exclusively engaged in the promotion of the purposes hereinabove mentioned, or by the establishment and/or support in whole or in part by the Trustee of charities devoted exclusively to the promotion of the same purposes, provided that all of such income shall not be devoted to any one or two charities to the exclusion of others." [Ex. A-1, pp. 5-6].

It is well established that a gift made simply to "charity" is sufficient to establish a valid charitable trust. There is no requirement that the trustor specify a particular object of his charity. *Estate of Bunn,* 33 Cal. 2d 897, 206 P. 2d 635 (1949); *Estate of Quinn,* 156 Cal. App. 2d 684, 320 P. 2d 219 (1958). That is substantially the procedure adopted by Mr. Irvine in the Indenture of Trust. He imposed the condition that the proceeds of the trust property be used "exclusively" for charitable purposes and not for any other purpose, but

left the selection of the particular charities to the discretion of the trustee.

In the succeeding provisions of the Indenture of Trust, suggestions are made to the Foundation by Mr. Irvine as to some general areas of charity in which he was interested. They read:

> "The Trustor has no intention or desire to restrict the Trustee in its selection of the specific charities to be benefitted by this trust, nor to make any exclusive designation thereof. Nevertheless, the Trustor interprets the charitable purposes of The James Irvine Foundation as stated in its Articles of Incorporation to include financial aid generally to worthy individuals, who through illness or misfortune are temporarily in need. There is, for example, a very large body of selfrespecting citizens who are not wealthy enough to afford for their families and themselves that same high quality of medical and surgical and hospital care which is open to the wealthy and also the very poor. It is the desire and hope of the Trustor that The James Irvine Foundation may find a means of extending such temporary aid to as many as possible of these worthy individuals and families, and in so doing, that worthy citizens and families residing in Orange County, California, be not overlooked.
>
> "The Trustor also suggests that a revolving fund be created for loans not to exceed in the aggregate One Thousand ($1,000.00) Dollars per person, with very moderate rates of interest, to worthy students and scholars who are in need of financial aid to carry on their studies in institutions of learning in California, and also in moderate amounts to

scientists or individuals engaged in research work who require financial assistance therein." [Ex. A-1, pp. 9-10].

These, of course, are merely precatory provisions which do not affect the condition imposed in the previously quoted portion of the Indenture that the proceeds of the trust property must be used *exclusively for charitable purposes and for no other purpose.* However, the suggested uses are charitable purposes as appears from the following cases in which analogous provisions were held to be charitable:

Financial Assistance to Worthy Individuals: *Estate of Henderson,* 17 Cal. 2d 853, 112 P. 2d 605 (1941), (To the Eastern Star Home of California "to be used by the trustees in such manner as may be most beneficial to the Home and its inmates."); *Estate of Tarrant,* 38 Cal. 2d 42, 237 P. 2d 505 (1951), ("Pension Fund of the Great Northern Railway Company, a corporation, with head offices at St. Paul, Minnesota."); *Estate of Hood,* 57 Cal. App. 2d 782, 135 P. 2d 383 (1943), ("to have said moneys and property used by my said Trustees for such purposes as shall do the most good to charities or individuals who are in need of assistance.").

Medical, Hospital and Surgical Assistance: *Dingwell v. Seymour,* 91 Cal. App. 483, 267 Pac. 327 (1928), ("establish and maintain thereon a hospital for the care and treatment of the sick and wounded of both sexes. . . .").

Needs of Citizens and Families of Orange County, California: *Estate of Robinson,* 63 Cal. 620 (1883), ("to the destitute women and children of the city of

San Francisco, California. . . ."); *Fay v. Howe,* 136 Cal. 599, 69 Pac. 423 (1902), ("the income to be used in aid of deserving aged native-born in the town of Southboro, Mass., needing such aid. . . ."); *Estate of Hood,* 57 Cal. App. 2d 782, 135 P. 2d 383 (1943), ("that in the spending . . . of the said sums . . . they use said moneys locally in and around the City of Fresno. . . .").

Education: *Collier v. Lindley,* 203 Cal. 641, 266 Pac. 526 (1928), ("To encourage and give educational opportunity for the study of . . . ."); *Estate of Yule,* 57 Cal. App. 2d 652, 135 P. 2d 386 (1943), ("said aid to be furnished as aforesaid to girl and women students may be in the form of a gift or loan. . . .").

Research: *Estate of Rollins,* 163 Cal. App. 2d 225, 328 P. 2d 1005 (1958), ("to some charitable institution, or research fund"); *Estate of Moore,* 190 Cal. App. 2d 833, 12 Cal. Rptr. 436 (1961), ("to some creditable non profit Science investigation Society").

Where, as here, a trust is established with a corporation as trustee, the purposes in the corporation's articles of incorporation as well as provisions of the trust instrument may be applied to limit the trust to solely charitable uses. This principle was stated in *Brown v. Memorial Nat. Home Foundation,* 162 Cal. App. 2d 513, 329 P. 2d 118 (1958), as follows:

> "Where a corporation becomes trustee of a benevolent trust the courts look first to its charter to determine the nature and extent of the dedication of its assets to eleemosynary purposes. [citation omitted.] 'Similarly, all the assets of a corporation organized solely for charitable purposes must be deemed to be impressed with a charitable trust

by virtue of the express declaration of the corporation's purposes. . . .' "

162 Cal. App. 2d at 520-521, 329 P. 2d at 122.

The Articles of Incorporation of the Foundation [Ex. A] impose a strict requirement that its assets be devoted exclusively to charitable purposes. They provide *inter alia:*

"Second: That this corporation is formed *solely for charitable purposes,* namely, public welfare, health, education, comfort, happiness and general well-being, particularly of the citizens and residents of the State of California, or any part thereof, and that this is a corporation which does not contemplate pecuniary gain or profit to the members thereof. (Emphasis added) [Ex. A, p. 1].

* * * * *

"Fifth: . . . This *is and shall always remain a charitable corporation,* and no member or director thereof shall ever have, own, or enjoy any personal property right or interest in or to any of the property of this corporation. (Emphasis added) [Ex. A, pp. 2-3].

* * * * *

"Seventh: These articles of incorporation and any provision or provisions thereof may be amended in any lawful manner, with affirmative vote or written consent of not less than six of the members of this corporation; provided, however, that never . . . shall the purposes of this corporation be changed or any of its property be diverted from the charitable uses and purposes for which this corporation is formed." (Emphasis added) [Ex. A, p. 4].

The wholly charitable object and purpose of the trust established by Mr. Irvine through the Indenture of Trust and the incorporation of the Foundation to serve as the trustee is well summarized in the District Court's findings, as follows:

> "In the indenture of trust it is stated that the purpose and object of the trust is to assist California charities. The same purpose and object is stated in the articles of incorporation of the Foundation. The incorporation of the Foundation and the execution of the indenture of trust with the Foundation as trustee are closely related. The manifest objective of James Irvine in incorporating the Foundation and in executing the indenture of trust was to make it possible for a substantial part of his property to be devoted to the assistance of California charities." [Clk. Tr. p. 172].

The provision in the Indenture of Trust excluding tax-supported charities as beneficiaries, which plaintiff contends has the effect of denying the trust the status of a charitable trust (Asserted Error No. 14; App. Op. Br. p. 28), reads in full:

> "It is also the direction of the trustor that charities receiving the substantial part of their support from taxation should not be beneficiaries of any of the property derived from this trust, but that all such property, available from time to time for the benefit of charities, shall be used for such charities as do not enjoy any substantial support through taxation." [Ex. A-1, p. 10].

The limitation here, if indeed it is a limitation, is only as to the class of charities that may be benefitted by the trust. It is no different from limiting the beneficiaries to a particular school or hospital or to people of a particular age or sex. The cases, in California as elsewhere, are unanimous in upholding the validity of charitable trusts which specify that only particular charities or objects of charity are to benefit from the trust. In addition to the cases cited *supra,* see:

Estate of Hood, 57 Cal. App. 2d 782, 135 P. 2d 383 (1943), ("that such moneys shall not go to any organization which has an overhead to carry on, but shall go, as hereinbefore specified, where said moneys and all thereof can do the most direct good."); *Estate of Purington,* 199 Cal. 661, 250 Pac. 657 (1926), ("to assist deserving women students at the University of California, who without such assistance might not be able to obtain the advantage of a college education."); *Estate of Yule,* 57 Cal. App. 2d 652, 135 P. 2d 386 (1943), (gift to University of Washingtoin to aid "girl and women students who are partially or wholly self-supporting and who are then attending the said University of Washington. . . ."); *Estate of DeMars,* 20 Cal. App. 2d 514, 67 P. 2d 374 (1937), ("Any amount left to go to the poor soldiers Letterman Hospital.").

There are no cases which hold to the contrary and no authorities which could be cited to support plaintiff's argument that the exclusion of tax-supported institutions from the class of charitable beneficiaries renders the trust non-charitable. The District Court rejected plaintiff's argument, saying:

> "It appears from the records of the Foundation over the years which were introduced into evidence

that there is no lack of California nontax supported organizations to whom the Foundation may properly make gifts. The records of the Foundation which are in evidence show a distribution of millions of dollars to innumerable California organizations.

"The plaintiff has cited no authority in support of her contention that exclusion of tax supported charities from the beneficiaries of a trust renders the trust a noncharitable trust. It would seem that it was the view of the trustor that nontax supported charities were more needful of support than were tax supported charities.

"It is the view and holding of the Court that the direction in the indenture of trust as to the exclusion of assistance to tax supported charities does not have the effect of denying the trust the status of a trust for charitable uses and purposes under the rule referred to." [Clk. Tr. pp. 170-171].

Plaintiff also contends, without citation of a single authority in point, that paragraph 2 of the Indenture, which gives the trustee discretion to add income to the capital of the trust, renders the trust noncharitable (Asserted Error Nos. 13, 15-22, 25; App. Op. Br. pp. 27-35, 37). Plaintiff's argument most clearly stated, is as follows:

"It is the theory of the plaintiff that paragraph 2 of the indenture of trust '*compels*' the trustee to use all or any part of the balance of the trust income after the deductions enumerated in paragraph 1, for *investment purposes which are private and non-charitable* that renders the trust illegal and

> void as such provision violates the law of perpetuities and the statutes against restraints on alienation of property. It is quite obvious therefore that the entire trust is bad and fails because it is illegal and void by reason of the power vested in the trustee for the non-charitable use of all or part of the income received from dividends on the Irvine stock which is the trust *res,* for investments, which thereupon *ipso facto* become part of the principal or corpus of the trust estate which can never be distributed for charitable purposes, as the trust is solely an income trust." (Emphasis added) (App. Op. Br. p. 29).

This argument is based on patent errors of both fact and law. The assertion that paragraph 2 of the Indenture "compels" the Foundation to invest income for "private and non-charitable" purposes is a clear misstatement of the provision. Paragraph 2 provides only that the Trustee *may* in its sound discretion add income to the trust property and requires that all income and profits from such additions are subject to the same restriction to charitable uses as the proceeds from the original trust property. Paragraph 2 reads in full:

> "2. Out of the balance of said income, after the deductions hereinabove provided, *the Trustee may,* and in the judgment of the Trustor should, *each year set aside such sums as the Board of Directors of the Trustee shall in its sound discretion deem wise and expedient for investment,* and said Trustee shall invest the same in accordance with subparagraph 3 of the powers hereinafter enumerated, which said investment, when made, shall become part of the corpus or principal of the trust

property, and *the income and profits therefrom shall thereafter be used, applied and devoted as in this trust provided.*" (Emphasis added) [Ex. A-1, pp. 4-5].

This paragraph contains a provision which is routinely included in instruments establishing trusts that are to be perpetual to protect against the always present possibility that the value of the trust property may be so diminished that the trust cannot effectively serve the charitable purposes for which it was established. The plaintiff has taken the provision out of context and has ignored the plain meaning of the language to make the argument that paragraph 2 compels the trustee to add all of the income to the capital of the trust leaving nothing for distribution to charity. The District Court properly rejected this argument as being contrary to the facts, saying:

> "It would hardly seem that James Irvine, after going to the work and effort to set up the Foundation and making it the trustee under the indenture of trust for the clearly expressed purpose and objective of assisting California charities, either intended or contemplated that under paragraph 2 in the indenture of trust the Directors of the Foundation could in their uncontrolled discretion defeat that purpose and objective by continually freezing all of the income into principal." [Clk. Tr. p. 174].

It seems too clear for argument that the Foundation could not assume the fiduciary obligations of a trustee to administer a trust for charitable purposes and then exercise a discretionary power to accumulate income

in such a way as to defeat the very purpose for which the trust was established. The charitable purposes of the trust are, of course, encompassed in the "sound discretion" which paragraph 2 requires the Foundation board of directors to exercise in deciding whether and to what extent income should be added to the trust capital. Within the discretion given in paragraph 2, income may be added to the capital of the trust only when and to the extent it would further, or assist in carrying out, the charitable purposes of the trust.

The District Court found the more "natural and reasonable construction" of the provision in paragraph 2 to be as stated in an excerpt quoted from the brief of the Attorney General of California, as follows:

> " 'Reading the trust instrument as a whole, as we are required to do, it is clear that it cannot reasonably be interpreted as creating a trust for the purpose merely of enlarging the trust corpus. Rather, its *purpose* is the distribution of funds for charity. This being so, the power of the trustee to apply income to investments is necessarily circumscribed thereby.
>
> " 'Powers of a trustee exist to carry out the trust objective. They may not be exercised independently and in opposition to the purpose of the trust. They are subordinate to the purpose of the trust and must be exercised in a manner that will further that purpose. * * *' " [Clk. Tr. p. 173].

This finding is unquestionably correct. Calif. Civil Code § 1641; *Pacific Home v. County of Los Angeles*, 41 Cal. 2d 844, 850, 264 P. 2d 539 (1953); *Estate of Miller*, 230 Cal. App. 2d 888, 907, 41 Cal.

Rptr. 410 (1964); *House of Rest v. County of Los Angeles,* 151 Cal. App. 2d 523, 528, 312 P. 2d 392 (1957). And, it is the only finding that properly could be made under the special rules of construction applicable to charitable trusts which are reviewed hereinabove.

However, even under the plaintiff's baseless and untenable construction of paragraph 2, the validity of the trust is in no way impaired. The plaintiff has made a gross error in asserting that a provision for the addition of income to the capital of the trust "renders the trust illegal and void as such provision violates the law of perpetuities and the statutes against restraints on alienation of property." Not a single authority has been cited by plaintiff which either holds or contains dictum in support of her assertion. This is because it is a matter of settled law in California and elsewhere in the United States that such provisions are not subject to rules against perpetuities and restraints on alienation and that such provisions, whether valid or invalid, *do not affect the existence or validity of charitable trusts.*

While not so acknowledged by plaintiff, paragraph 2 is an ordinary provision for accumulations:

> "Where the rents, dividends or other income is treated by the trustee as capital, and he invests it, makes a new capital of the income derived therefrom, and invests that, and so on, such capital and accrued income constitute 'accumulations'."
>
> *Estate of Steele,* 124 Cal. 533, 541, 57 Pac. 564, 567 (1899).

Accumulation provisions, whether discretionary as in the Indenture of Trust, or mandatory, do not affect

the charitable nature of the trust or its validity as a charitable trust. The income that is invested becomes a part of the trust property and is subject to the same restriction to charitable uses as the original capital. Moreover, accumulation provisions are not subject to rules against perpetuities and restraints on alienation. Rather, they are subject to judicial supervision. If the trust instrument requires accumulations that are unreasonable or if a trustee that has discretion to accumulate does so to an unreasonable extent, the court may order the distribution of the income or otherwise restrict the amount of the accumulation.

In no event does a provision authorizing or directing the accumulation of income as an addition to the trust property operate to invalidate the trust. In *Estate of McKenzie,* 227 Cal. App. 2d 167, 38 Cal. Rptr. 496 (1964), the California Court of Appeals so held with the succinct statement that accumulations in charitable trusts are subject to judicial supervision and do not affect "the *existence* or the *validity* of the trust itself." (Emphasis added).

In the early case of *Duggan v. Slocum,* 92 Fed. 806 (2d Cir. 1899), the trust provisions directed the trustee to invest the trust income in securities "for a term of ten years *or more,* at the discretion of my said executors." The court held that since the trust was limited to charitable uses and was therefore exempt from the rule against perpetuities, the accumulations were likewise exempt. With respect to the discretionary power of the trustees to extend the period of the accumulation indefinitely, the court stated:

> "It is possible that they will use their discretion to an extent which will not be satisfactory to the

people who may become interested in the establishment of the charities, but a plainly indiscreet exercise of their discretion is within the control of a court of equity, and would be corrected. Story, Eq. Jur. § 1191." 92 Fed. at 810.

An excellent summary of the authorities applicable to accumulation provisions in charitable trusts is found in *Wendell v. Hazel Wood Cemetery,* 67 A. 2d 219 (N.J. 1949), *aff'd,* 72 A. 2d 383 (1950), where the court upheld a direction to the trustee "to add any surplus there may be to the principal of the trust fund":

"Where there is an immediate vesting of a trust fund, for charitable purposes, a will is not void because it directs or permits accumulations for an unspecified period of time. Conway v. Third Nat. Bank & Trust Co. of Camden, 118 N.J. Eq. 61, 177 A. 113, affirmed 119 N.J. Eq. 575, 182 A. 916. This decision should set at rest any question touching the validity of this direction for accumulations. See, also, Page on Wills, p. 676, Sec. 1256, and Gray on Perpetuities (4th Ed.), p. 630, par. 678, where the text reads as follows: 'Where there is an unconditional gift to charity, the gift will be regarded as immediate and good, although the particular mode of carrying out the charity which the donor has indicated is too remote. Consequently in such a case if a direction for accumulation is invalid the only result is that the income is immediately distributable in charity; *the heirs or next of kin are not let in.*' (Italics mine). And, at page 633, par. 679: 'If the purpose of the trust cannot be carried out without accumulation for too long a period, the fund may be applied cy pres.'

"Citing Conway v. Third Nat. Bank & Trust Co. of Camden, supra. See, also, Restatement, Trusts, par. 401, Comment L, which reads as follows: 'In the absence of a statute otherwise providing, a direction to accumulate the income of property held upon a charitable trust is valid, although the period of accumulation is longer than the period of the rule against perpetuities'. And in 3 Scott on Trusts, sec. 401.9, p. 2142, the text reads as follows:

" 'Where property is given upon an unconditional trust for charitable purposes but it is provided that the income shall be accumulated for a certain time, the American courts have generally held that the provision for accumulation is binding unless under all the circumstances the period of accumulation is unreasonably long. The fact that the period is longer than lives in being and twenty-one years does not necessarily invalidate the provision.

" 'If there is an unconditional gift for charitable purposes, the gift does not fail although it is provided by the terms of the trust that the income shall be accumulated for a period longer than that of the rule against perpetuities. If the direction for accumulation is valid, it will be enforced. If the provision for accumulation is invalid, it will be disregarded and the court will direct the immediate application of the property to the designated charitable purposes. This is in accordance with the general principle underlying the cy pres doctrine, * * *.'

"See, also, 41 Am.Jur., p. 93, sec. 48; 48 C.J. 990, Sec. 80.

"In the light of these authorities it must be concluded that the direction for accumulation here is valid. If some time in the future the accumulations should appear to a court of competent jurisdiction to be unreasonable, the accumulations might be ordered distributed to the named beneficiaries immediately or cy pres. But to paraphrase the language of Mr. Justice Heher in Conway v. Third Nat. Bank & Trust Co. of Camden, supra, 'There is no present necessity for determining this question; it may be settled when it arises, if it ever does arise.' In any event 'the heirs or next of kin are not let in.' Gray on Perpetuities, supra, par. 678."

67 A. 2d at 224.

There are innumerable cases in which charitable trusts subject to mandatory provisions for the accumulation of income have been upehld as valid even though the required period of accumulation extended well beyond the period permitted by the applicable rules against perpetuities and restraints on alienation. A few examples are: *Penick v. Bank of Wadesboro,* 12 S.E. 2d 253 (N.C. 1940); *Schreiner v. Cincinnati Altenheim,* 22 N.E. 2d 587 (Ohio 1939); *Frazier v. Merchants National Bank of Salem,* 5 N.E. 2d 550 (Mass. 1936); *Reasoner v. Herman,* 134 N.E. 276 (Ind. 1922); and *Boston v. Doyle,* 68 N.E. 851 (Mass. 1903).

The conclusion reached by the court in *Reasoner v. Herman* typifies the holdings in the cases:

"Appellees talk of this accumulation as going through the ages until it becomes a public menace.

> There is no occasion for alarm; for this may be limited by a court of equity, so that it will not be a public menace, and so that it will best subserve the main purpose, charity." 134 N.E. at 280-281.

Under California law the Attorney General is and always has been charged with the supervision of the administration of charitable trusts. See *People v. Cogswell,* 113 Cal. 129, 45 Pac. 270 (1896); *Brown v. Memorial Nat. Home Foundation,* 162 Cal. App. 2d 513, 329 P. 2d 118 (1958); Calif. Government Code, §§ 12580-12596 (The Uniform Supervision of Trustees for Charitable Purposes Act); and Calif. Corporations Code §§ 9505, 10207. The administration of accumulation provisions is specifically referred to in section 10207 of the Corporations Code (based on former Civil Code § 606 as enacted in 1927 and amended in 1929). It provides:

> "Examination by Attorney General: Institution of proceedings: Restriction on accumulation of income. Each such corporation shall be subject at all times to examination by the Attorney General, on behalf of the State, to ascertain the condition of its affairs and to what extent, if at all, it may fail to comply with trusts which it has assumed or may depart from the general purpose for which it is formed. In case of any such failure or departure the Attorney General shall institute, in the name of the State, the proceedings necessary to correct the non-compliance or departure. Except as specially approved by the Attorney General such a corporation shall not accumulate income for a period longer than five years."

The District Court properly concluded from the statutory provisions referred to above, that the Attorney General has the duty to and can always obtain the necessary judicial supervision to prevent the Foundation from exercising its discretion under the accumulation provision in the Indenture of Trust in such a way as to depart from the charitable objects and purposes of the trust [Clk. Tr. p. 173].

Plaintiff's unsupported assertion that the accumulation provision in the Indenture of Trust renders it "illegal and void" (App. Op. Br. p. 29), is erroneous under California law even with respect to private trusts. Calif. Civil Code, § 725; *In re Yates Estate,* 170 Cal. 254, 149 Pac. 555 (1915). Civil Code section 725 provides:

> "If the direction for an accumulation of the income of property is for a longer term than is limited in the last section, the *direction only, whether separable or not* from the other provisions of the instrument, is void as respects the time beyond the limit prescribed in said last section, and *no other part of such instrument is affected* by the void portion of such direction." (Emphasis added).

Under this statute, even private trusts which are subject to rules against perpetuities and restraints on alienation, are not rendered invalid or void by a provision permitting the trustees in their discretion to accumulate income indefinitely. Clearly, then, trusts limited to charitable uses which are exempt from rules against perpetuities and restraints on alienation are not invalidated or voided by such a provision and *Estate of McKenzie,* 227 Cal. App. 2d 167, 38 Cal. Rptr. 496 (1964) so holds.

Plaintiff's reliance on *Estate of Sutro,* 155 Cal. 727, 102 Pac. 920 (1909); *Estate of Kline,* 138 Cal. App. 514, 32 P. 2d 677 (1934); *Estate of Peabody,* 21 Cal. App. 2d 690, 70 P. 2d 249 (1937); *Estate of Vance,* 118 Cal. App. 163, 4 P. 2d 977 (1931); *Grigson v. Harding,* 144 A. 2d 870 (Maine 1958); and *Goetz v. Old Nat. Bk. of Martinsburg, W. Va.,* 84 S.E. 2d 759 (W. Va. 1954), to support her contention that the accumulation provision in the Indenture of Trust renders it illegal and void (App. Op. Br. pp. 34, 63-64), is badly misplaced. Those cases do not deal with, nor even discuss, the question of accumulation of income in charitable trusts. Rather, the issue before the court in each case was whether the trustee was required by the terms of the trust instrument to limit the beneficiaries of the trust to solely charitable organizations and causes.

In *Estate of Sutro,* cited *supra,* trust provisions contained in a will included the direction that the trustees apply the proceeds "to the uses and purposes, charitable, educational *and other,* which are, in this will, provided and specified." The court found that there was nothing in the will to show that the *"other"* uses referred to were limited to charitable uses and that the trustee could select non-charitable enterprises as beneficiaries of the trust without violating the terms of the will.

In *Estate of Kline,* cited *supra,* a will contained a trust provision directing that, "all of the rest and remaining income received and derived from the trust estate . . . shall go and be paid, used and/or disbursed by my said Trustee to such *persons, charitable organizations and/or corporations* . . . selected by my said trustee in its absolute and uncontrolled discretion." The court found that the word *"persons"* and the phrase

"and/or corporations" were not limited to charitable causes and enterprises, and thus the trustee, without violating the terms of the trust, could disburse the proceeds of the trust to non-charitable uses.

In *Estate of Peabody,* cited *supra,* the residuary clause of decedent's will provided for "the balance of the estate to be liquidated then to go to *an institution for old people* in memory of my beloved Mother and Father, Mr. J. Haskell is to make the choice of the institution." The court found that under this provision the trustee could nominate an institution that was run for profit as the beneficiary and therefore the trust was not limited to charitable uses.

In *Estate of Vance,* cited *supra,* the will directed that the residue of the estate be given in trust ". . . to be invested in Bibles, to be distributed in home and foreign lands in such quantities and in such places as may to my said executors seem best." The court held that under this direction the Bibles could be distributed for profit without violating the terms of the will and, therefore, that the trust was not limited to charitable uses.

In *Grigson v. Harding,* cited *supra,* the only direction given as to the ultimate disposition of decedent's property was that "after the disposition of the laboratory by my trustees, I direct that my other estate shall be turned over to the trustees, organizations or persons having the care of the laboratory, and the income used to aid in its upkeep and maintenance." The Maine court found that the organizations that might have the care of the laboratory were not limited to charitable organizations and, accordingly, that the trust proceeds could be distributed for the benefit of enterprises engaged in business for profit.

Finally, in *Goetz v. Old Nat. Bk. of Martinsburg,* cited *supra,* a decedent bequeathed the residue of her estate in trust "to distribute and pay over the same unto such religious, charitable, scientific, literary, educational, or fraternal corporations and associations, as they may, in their discretion select and determine. . . ." The West Virginia court held that the attempted trust for religious purposes did not comply with the statutes of that State requiring the naming of religious organizations as trust beneficiaries and that the trustees could select non-charitable scientific, literary or educational organizations as beneficiaries of the trust without violating the provisions of the will.

The foregoing cases clearly do not support plaintiff's assertions that the accumulation provision in the Indenture of Trust renders the trust illegal and void; nor do the cases have any other application to the case at bar. Here, the provisions of the Indenture of Trust as well as the Foundation's Articles of Incorporation in direct and mandatory language limit the beneficiaries of the trust to charities and require that the proceeds of the trust property "be used, applied and devoted by the trustee *exclusively* to or for the advancement of any charitable use or purpose in the State of California." In the light of the plain meaning of the words used in those documents there can be no doubt that the trust established by Mr. Irvine is limited to charitable uses and purposes and is therefore exempt from the operation of rules against perpetuities and restraints on alienation. Constitution of California, Article XX, Section 9.

Plaintiff also contends that the trust is not charitable on the ground that the accumulation provision in para-

graph 2 of the Indenture of Trust shows that Mr. Irvine had a motive other than benefit to charity in establishing the trust (App. Op. Br. pp. 32, 80). There is no merit in this contention.

It cannot be expected that anyone establishing a trust that is to be perpetual can foresee what the value of the trust property may become or the amount of capital that may be required in the future to serve effectively the charitable needs for which the trust was established. The only reasonable inference that can be drawn from the inclusion of a provision in the Indenture of Trust permitting the trustee, in its discretion, to accumulate income is that Mr. Irvine desired to provide the trustee with the flexibility to increase the size of the trust fund if the trustee should determine that such an increase was necessary to carry out the charitable purposes of the trust; and this was the finding of

However, no time need be devoted to a determination of Mr. Irvine's motives in establishing the subject trust. Under California law, whether the trust is charitable must be determined by the uses and purposes to which the proceeds of the trust property may be applied rather than by the trustor's motive in establishing the trust. *Estate of Robbins,* 57 Cal. 2d 718, 21 Cal. Rptr. 797 (1962); *Davenport v. Davenport Foundation,* 36 Cal. 2d 67, 222 P. 2d 11 (1950).

In *Estate of Robbins,* an heir challenged the validity of a trust on the ground that it was non-charitable and therefore invalid because the testator's motive in establishing the trust was to encourage the commission of political crimes. The California Supreme Court as- the District Court.

sumed, for purposes of its decision, that the testator's motive in establishing the trust was as contended by the heir, but held that his intent or motive for making the gift in trust for charity was immaterial. In the words of the court:

> "It is the purpose for which the property is to be used, however, not the motives of the testator that determines whether a trust is a valid charitable trust."
>
> 57 Cal. 2d at 724, 21 Cal. Rptr. at 800.

Fully recognizing the binding effect of this decision by the California Supreme Court that the motive of the trustor is immaterial in determining whether a trust is charitable, we cannot pass without noting that Mr. Irvine's interest in benefitting the objects of charity in this State through the trust administered by the Foundation is clearly established in the record of this case [*See, e.g.,* Rep. Tr. pp. 1810-1811, 3518-3519].

Plaintiff also argues that the District Court erred in considering the Foundation's Articles of Incorporation as well as the Indenture of Trust in determining that the subject trust is limited to charitable uses and purposes (Asserted Error Nos. 16, 17, 18, 19, App. Op. Br. pp. 29-32). The District Court's consideration of the Articles of Incorporation was, of course, entirely appropriate since the trust was established by the Indenture of Trust under the management of the Foundation, as trustee. *Brown v. Memorial Nat. Home Foundation,* 162 Cal. App. 2d 513, 329 P. 2d 118 (1958). The Dis-

trict Court quoted the governing rule from the opinion in the *Brown* case as follows:

> "Where a corporation becomes trustee of a benevolent trust the courts look first to its character to determine the nature and extent of the dedication of its assets to eleemosynary purposes * * *." [Clk. Tr. p. 172]

The case of *Davenport v. Davenport Foundation,* 36 Cal. 2d 67, 222 P. 2d 11 (1950), which is the sole authority upon which plaintiff relies to support her contention that the District Court erred in not limiting its consideration to the Indenture of Trust, is not in point. As appears from the opinion of the Supreme Court and the prior opinion of the District Court of Appeal (215 P. 2d 467 (1950)) the issue raised by plaintiff's contention was not before the court in that case; nor was it ever discussed or even mentioned in the opinions. Unlike the trusts in the *Brown* case and in the case at bar, the management, control and direction of the trust in the *Davenport* case was not committed to a corporation, but to a group of five individuals who were designated as a board of trustees. Under the trust instrument, legal title to the trust property was conveyed to LaVerne College, but its authority was specifically limited to whatever ministerial acts were necessary to carry out the orders and directions of the individual trustees. It was more than a year after the establishment of the trust that the trustees caused the Davenport Foundation to be incorporated and even then the powers given by the trust instrument to the individuals serving

as a board of trustees continued as before. Accordingly, the provisions of the Articles of Incorporation of the Davenport Foundation were not before the court and it had no occasion or reason to consider them.

To the extent that the plaintiff's other assertions and arguments on this issue may warrant any discussion, they are ably reviewed in the brief of defendant Thomas C. Lynch, Attorney General of the State of California, and, in the interest of conserving the time of the Court and Counsel, we adopt the arguments set forth in the Attorney General's brief as to the matters which are not discussed hereinabove.

We respectfully submit that the District Court did not err in finding that the Indenture of Trust dated February 24, 1937, established a valid trust for charitable uses and purposes to which the rules against perpetuities and restraints on alienation do not apply.

VI.

The District Court Did Not Err in Denying Plaintiff's Request That the Court Take Judicial Notice of a Compilation of Letters, Newspaper Articles and Other Data Transmitted to the Members of a Legislative Subcommittee by Its Chairman.

The plaintiff has filed with this Court a volume entitled "Subcommittee Chairman's Report to Subcommittee No. I Select Committee on Small Business" [Clk. Tr. p. 221]. This same volume was submitted to the District Court as a purported appendix to plaintiff's *closing* post trial brief under the guise that its contents were subject to judicial notice. The District Court, on motion of the Foundation, properly denied plaintiff's request that judicial notice be taken of the volume and its contents [Clk Tr. p. 135].

Plaintiff cites no authority in support of her unilateral attempt to inject this compilation of inadmissible materials into the record. Plaintiff offers only the unsupported generalization that the District Court was required to take judicial notice of the volume and its contents (App. Op. Br. p. 8). The plaintiff is in error in this assertion. Judicial notice cannot be used to augment the record with writings which contain inadmissible hearsay and opinions, and for which there has been no foundation or authentication. *Alvary v. United States,* 302 F. 2d 790, 794 (2nd Cir. 1962).

The subject volume contains 1130 pages of copies of records, newspaper clippings, letters, and summaries of data collected by a legislative subcommittee in connection with its continuing study of the impact of tax-exempt foundations and charitable trusts on the Nation's economy, and a letter of transmittal from the chairman of the subcommittee to its members. Compilations of such documents are not subject to judicial notice and are not otherwise admissible as evidence. It is only "official acts of the legislative, executive and judicial departments of the United States," that may be judicially noticed. Calif. Evidence Code § 452(c). There is no statute or case law which permits judicial notice of correspondence between the chairman and members of a legislative subcommittee or of the letters, newspaper clippings and other records and data collected by the subcommittee. *Olender v. United States,* 210 F. 2d 795 (9th Cir. 1954), *Love v. Wolf,* 226 Cal. App. 2d 378, 38 Cal. Rptr. 183 (1964).

In *Olender v. United States,* the issue, as in this case, was whether a file of an official government agency, which included documents obtained from private sources together with documents prepared by officials

of the agency, could be considered by the trier of fact. This Court held in that case that the file was inadmissible and that the trial court erred in receiving it in evidence.

We respectfully submit that the District Court did not err in denying plaintiff's request that it take judicial notice of the referenced volume.

Conclusion.

The plaintiff, whose wealth accrues from the benevolence of her grandfather and his concern to provide for his family, has by this action attempted to thwart his concern also for the objects of charity among the people of California. The "assistance of California charities", which the District Court found to be the "manifest objective of James Irvine" in establishing a perpetual trust, has been a reality for more than 30 years.

> "In fulfilling its obligations under this trust, the foundation has quietly and without publicity granted major sums for capital improvements to almost every private university within the State of California and to a large number of hospitals in the Orange County and San Francisco Bay regions. . . . Perhaps by these grants the Irvine name will engender its most precious light and warmth."
>
> Cleland, *The Irvine Ranch,* 146-147 (1962) [Ex. E-9].

Plaintiff's superficial claims that the trust is invalid were not established by evidence in the District Court. Accordingly, in this Court, plaintiff has been able to rely only upon wishful embellishments of the evidence

and an assiduous presentation of suppositions and conjectures to support her contention that the District Court's findings are "clearly erroneous".

We respectfully submit that the findings of the District Court are fully supported by the evidence in the record and that its Judgment should be affirmed, with costs to the appellees.

Respecfully submitted,

McCUTCHEN, BLACK, VERLEGER & SHEA,
BURNHAM ENERSEN,
HOWARD J. PRIVETT,
SHELDON A. GEBB,

Attorneys for Appellees The James Irvine Foundation, N. Loyall McLaren, A. J. McFadden, James G. Scarborough, Robert H. Gerdes, James H. Metzgar, Edward W. Carter, Mark R. Sullivan, John V. Newman, John A. Murdy, Jr., Morris M. Doyle and William Bradford Hellis.